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Supreme Court, U.S.
FILED
FEB 2 2 2000
CLERK

No. 99-7000

In The

Supreme Court of the United States

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD ANGELONE, Director,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

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Petition For Certiorari Filed November 16, 1999
Certiorari Granted January 7, 2000

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

244 pp

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Norfolk Division

BOBBY LEE RAMDASS,

Petitioner,

v. **2:96CV831**

RONALD J. ANGELONE, Director of the Virginia Department of Corrections,

Respondent. **[Filed Feb. 27 1993]**

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This matter was initiated by petition for writ of habeas corpus under 28 U.S.C. § 2254. The matter was referred to the undersigned United States Magistrate Judge pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C) and Rule 28 of the Rules of the United States District Court for the Eastern District of Virginia.

I. STATEMENT OF THE CASE

A. Background

Petitioner is before the Court seeking a writ of habeas corpus as a result of his convictions in the Circuit Court of Fairfax County, Virginia, of capital murder, robbery, and use of a firearm in the commission of a felony, all of which occurred in the course of an armed robbery on September 2, 1992, during which Mohammad Z. Kayani, a convenience store clerk, was slain. Petitioner was tried

in January, 1993, pled guilty to the robbery and was found guilty of the murder and use of a firearm charges following a jury trial. Petitioner was sentenced to death for the murder and to terms of imprisonment for the remaining offenses. All sentences imposed by the jury were ordered by the Court on April 2, 1993.

B. Facts

The Court's decision is driven by the facts set forth in the record. A significant portion of the factual summary which follows has been taken from the opinion of Virginia Supreme Court Justice Whiting denying petitioner's claims on direct appeal. *Ramdass v. Commonwealth*, 437 S.E.2d 566, 568 (Va. 1993). Additional matters relevant to the issues before the Court have been added as appropriate, both here and in the body of the opinion, to complete the context in which the petition has been considered.

At the outset, it is important to note that the trier of fact may not impose the death penalty in the absence of a finding beyond a reasonable doubt that (1) "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society," or (2) "that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code § 19.2-264.4(C).

Following petitioner's conviction, but prior to the penalty phase, the prosection [sic] conceded that it was not entitled to proceed under the second part of the statute (vileness) but only to "proceed[ ] under the alternative theory of future dangerousness. . . . " (1/29/93 Tr. at 8.)

Between August 25, 1992, and September 2, 1992, petitioner and several associates, two of whom testified at his trial, committed four armed robberies. During one of the robberies, petitioner pistol-whipped the night clerk at the hotel being robbed; the following night, he shot a cab driver in the head, leaving him to die. The cab driver lived to testify at trial. Two days later, the predicate offenses occurred.

During the night of September 1, 1992, and early morning of September 2, 1992, petitioner and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. The restaurant was closed. Instead, the men, including petitioner, decided that they would rob persons at a 7-Eleven store on Buelah Street in Fairfax County.

Near one o'clock on the morning of September 2, 1992, the five men entered the 7-Eleven store. Petitioner entered first and "drew" his pistol on Kayani, a clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed,

took the customers' wallets, money from the cash register, cigarettes and lottery tickets from the store's stock, and Kool-Aid.

After petitioner ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Petitioner squatted next to Kayani and yelled at him to open the safe "or I'll blow your f – – head off.[1]" *Ramdass*, 437 S.E.2d at 568. At approximately the same time, Wilson fired his pistol at one of the customers lying on the floor. (1/27/93 Tr. at 206-07.) Immediately thereafter, Singh, standing behind petitioner, saw petitioner shoot Kayani in the head on his second attempt to get the weapon to fire. (1/27/93 Tr. at 211-12.) Testifying about the precise moment of the shooting, Singh stated that petitioner "[c]licked it once and it didn't go off, clicked it again and it went off." (*Id.*)

Just after petitioner shot Kayani, Ramirez returned from a back room in the store. Ramirez saw petitioner laughing as he stood over Kayani's body. (1/27/93 Tr. at 145.) Later, Ramirez heard petitioner say that he shot Kayani because he "took too long." (1/27/93 Tr. at 147.) Shortly thereafter, Ramirez opened the front door and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged petitioner to "[c]ome on." (*Id.* at 146.) However, petitioner was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." (*Id.*) One of the customers also heard the

[1] Another employee of the 7-Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

clicking of the gun as petitioner left. (1/27/93 Tr. at 125, 129-30.)

When they got in the car, Ramirez heard petitioner ask Wilson, "[w]hy didn't you get rid of the people on the floor?" (*Id.* at 146.) After the men divided the robbery proceeds at Singh's home, petitioner told Ramirez, "[d]on't tell anybody about this [o]r I'll kill you and I'll kill your whole family." (1/27/93 Tr. at 146-47.)

Singh, a co-owner of the gun with petitioner, testified that the gun would not fire unless held at a certain angle because the bullets in the cylinder were not the right size for the gun. Singh was corroborated by Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, who later examined and test-fired the gun. (*Id.* at 247.) Mason testified that the 9 millimeter cartridges petitioner used in the gun were smaller than the .38 caliber cartridges designed for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward in the cylinder to be struck by the firing pin. (*Id.* at 250-51.) Mason further testified that when the muzzle was pointed up, cartridges slid back closer to the firing pin, and the gun could be fired. (*Id.* at 251.)

The Commonwealth, in seeking the death penalty, only relied upon the "continuing serious threat to society" condition, also known as "future dangerousness." In support of its position, the Commonwealth introduced evidence of petitioner's use of a firearm and participation in the robbery of a Pizza Hut on August 25, 1992; robbery on August 29, 1992, of a hotel night clerk, who was physically beaten by petitioner and threatened with a gun

during the robbery; use of a firearm and robbery of a Domino's Pizza restaurant on August 30, 1992; and a second robbery and attempted murder, on August 30, 1992, of a taxi driver, who was shot in the head by petitioner. At the time of trial, petitioner had been convicted of the Pizza Hut crimes and the Domino's Pizza crimes and formally sentenced for the Pizza Hut robbery. At the time judgment was imposed by the court for the 7-Eleven crimes, petitioner had additionally been convicted and sentenced for the hotel robbery and formally sentenced for the Domino's robbery.

While all of the above described offenses occurred within a week of the murder of Kayani, the jury was also made aware of petitioner's troubled history.

The record reveals that the jury was informed of petitioner's extensive juvenile record, beginning in 1985, with a purse snatching, for which he received probation, (1/29/93 Tr. at 198-99); theft of a moped and a burglary, for which he was sentenced to a juvenile facility, (1/29/93 Tr. at 200); being a juvenile escapee, (1/29/93 Tr. at 201); and robbery as a juvenile, for which he was sentenced to Southampton prison as an adult, (1/29/93 Tr. at 17-18, 202). The jury also learned that petitioner acquired his first gun at age thirteen or fourteen, while he was selling drugs, (1/29/93 Tr. at 149-51); that he was in possession of a loaded gun when he was arrested, as a juvenile, and charged with robbery, (1/29/93 Tr. at 24); and that he violated his parole, which began on May 21, 1992, by acquiring a gun on July 4, 1992, less than sixty days later, (1/29/93 Tr. at 85-86, 202).

To offset the elaborate prosecution effort to establish petitioner's future danger to society, the defense presented evidence of a bleak, abusive, unstructured childhood, during which petitioner was physically and emotionally abused, raised in conditions of severe deprivation and in the complete absence of any positive guidance.

Petitioner's brother, Mark Ramdass, was called on petitioner's behalf. After admitting that he would not have appeared without being subpoenaed, Ramdass described his brother's efforts to protect him and try to keep him out of trouble. (1/29/93 Tr. at 103-05.) He also acknowledged his brother's numerous encounters with the law and incarceration, and admitted his own criminal activities, resulting in two felony convictions. (*Id.* at 112.) At one time, petitioner and the witness were both at Southampton Correctional facility. (*Id.* at 113.)

Jennifer Joffe, a Virginia probation/parole officer, was called by the defense. She prepared the probation report, following petitioner's 1988 conviction for robbery. (*Id.* at 115.) Joffe presented evidence of petitioner's home environment and difficult upbringing. On cross-examination, she acknowledged that none of the counseling reports prepared on petitioner revealed the presence of psychoses or serious mental problems. (*Id.* at 126.) She also concurred in the assessment of petitioner as immature, impulsive, unremorseful, and possessed of a great potential for violence. (*Id.* at 127.) In response to the question "[y]ou felt he was a danger on the street," she responded, "[y]es." (*Id.* at 128.)

Petitioner's mother testified that she was one of twenty-one children and that she was sexually abused and ran away from home at an early age. (*Id.* at 217.) She was working as a topless dancer when petitioner was born. (*Id.* at 219.) She acknowledged being convicted of writing a bad check and two assault and battery charges, and confirmed that she twice lost custody of her children for neglect. (*Id.* at 227-28.) She described how petitioner was physically abused by a boyfriend and how she taught petitioner to defend himself. She admitted contracting venereal disease from another live-in boyfriend and admitted assaulting a former boyfriend and a neighbor. (*Id.* at 232, 228-30.)

Finally, the following exchange took place between defense counsel and petitioner's mother:

> Q. Do you realize that Bobby could be executed?
>
> A. Yes.
>
> Q. How do you feel about that?
>
> A. I don't know.
>
> Q. He's your son. How do you feel about the fact that he could die?
>
> A. I just don't know. I just – I'm not feeling anything right now.
>
> . . . .
>
> Q. Did you ever teach Bobby not to cry?
>
> A. Yes.
>
> Q. Did you teach him not to show any emotion?

> A. Yes, I taught him that, too.
>
> Q. Did you show any emotion?
>
> A. Not lately, no, not for a long time.

(4/2/93 Tr. at 10-11).

The factual issues addressing petitioner's future threat to society and the mitigating factors offered to explain, in part, petitioner's conduct were thoroughly explored.

C. Procedural History

On September 2, 1992, petitioner murdered Muhammad Kayani, a clerk employed at a 7-Eleven convenience store on Buelah Street in Fairfax County, Virginia. He was arrested on September 11, 1992, for an earlier robbery, together with other defendants, and ultimately connected to the 7-Eleven robbery and murder. On September 21, 1992, petitioner was indicted by a Fairfax County grand jury on capital murder, armed robbery, and use of a firearm in the commission of a robbery.

Counsel was appointed in timely fashion, pretrial discovery was promptly pursued, and the matter came on for trial on January 26, 1993. At trial, petitioner, by counsel, entered a plea of guilty to the robbery charge which was accepted by the court following the normal colloquy. However, at the request of the Commonwealth Attorney, and over the objection of defense counsel, a finding with regard to Count II of the indictments, robbery, was withheld pending the receipt of evidence of the other offenses.

At the conclusion of the evidential portion of the trial, the jury returned a verdict of guilty of capital murder and guilty of use of a firearm in the commission of a felony, for which petitioner was sentenced to four years in the penitentiary. Following the jury verdict, the court found petitioner guilty with respect to Count II, robbery, finding on the record that petitioner's plea of guilty was freely and voluntarily given. The defense waived preparation of a presentence report, but the court, *sua sponte*, ordered the preparation of a presentence report on the offense of robbery. Thereafter, the jury heard evidence with regard to punishment on the capital murder charge, and following argument and instruction by the court, returned a verdict of death.

In anticipation of preparation of the presentence report, the matter was set over for further proceedings on March 3, 1993. However, sentencing was continued from that date until April 2, 1993, at which time the court imposed judgment upon petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder; four years in the penitentiary, in conformity with the jury verdict, for use of a firearm in the commission of a felony; and life for the robbery, incident to petitioner's plea of guilty.

While the jury was deliberating on punishment during the penalty phase of the capital murder proceeding, they submitted a question to the court stated as follows: "[I]f the defendant is given life, is there a possibility of parole at some time before his natural death," (1/29/93 Tr. at 278), to which the court responded: "[I]f you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under

the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (1/29/93 Tr. at 281.)

Trial counsel pursued a direct appeal on behalf of petitioner, assigning the following errors:

> 1. The Trial Court erred in denying the Appellant's Motion For A Bill of Particulars, thereby denying Appellant his rights protected by the Sixth and Fourteenth Amendments of The United States Constitution and the Constitution of Virginia.
>
> 2. The Trial Court erred, and denied the Appellant his Fifth, Sixth and Fourteenth Amendment rights, and his Rights protected by The Virginia Constitution through the denial of his motion for discovery of co-defendant polygraph questions and answers for impeachment purposes.
>
> 3. The Trial Court erred in granting an extended reasonable doubt instruction.
>
> 4. The Trial Court erred in denying the jury instruction utilized in *Commonwealth v. Wright*, tried in the same circuit and approved by the Virginia Supreme Court.
>
> 5. The Trial Court erred in denying the defendant's proffered jury instruction regarding the inconsistent testimony of Shane Singh.
>
> 6. The Trial Court erred in admitting evidence of the Defendant's unadjudicated misconduct in violation of the United States and Virginia Constitutions.
>
> 7. The Trial Court erred in denying the Defendant's proffered sentencing jury instruction "B-S" which instructed the jury that they must

all agree that the Defendant would be a future danger.

8. The Trial Court erred, and denied Defendant his rights protected by the Virginia and United States Constitutions 5th and 14th Amendment Rights, by denying Defendant's proffered sentencing jury instruction "E-S" which instructed they [sic] jury as to the standard of proof required to be convinced of the unadjudicated misconduct of the Defendant.

9. The Trial Court erred in refusing to respond to a jury question, during the sentencing stage of the trial, that Defendant would not be eligible for parole upon his conviction of capital murder in the instant matter in violation §19.2-264.4 of the Virginia Code and the Eighth and Fourteenth Amendments to the United States Constitution.

10. The Trial Court erred in denying Defendant the right to raise his inability to make parole upon conviction of the capital murder in the instant case.

11. The imposition of the death penalty by electrocution is cruel and unusual punishment, in violation of the Virginia Constitution and the Eighth Amendment of the United States Constitution and the Trial Court erred in finding to the contrary.

12. The Trial Court erred in withholding a finding of guilt on the underlying robbery charge, and further erred, and denied the Defendant's 5th and 14th Amendment rights by refusing to sentence the Defendant without a presentencing report despite its waiver by Defendant and his counsel and the fact that the

Defendant had been incarcerated the entire period of time since the preparation of the prior presentencing report.

13. The Trial Court erred in denying the defendant funds for expert witnesses, medical doctors, private investigators.

14. The Trial Court erred in denying the Defendant a medical expert to perform a competent physical examination to ascertain his physical disabilities.

15. The Court erred in denying the Defendant discovery regarding future dangerousness prior to trial.

16. The Trial Court erred in denying Defendant's Motion to Dismiss on the basis that the Virginia Death Penalty Statute is unconstitutional.

17. The Trial Court erred in denying defendant's motion to dismiss on the basis of the denial of due process under the United States and Virginia Constitutions.

18. The Trial Court erred in refusing to dismiss a juror who was personally acquainted with one of the Commonwealth (police) witnesses, and an additional juror who had preconceived notions regarding the brutality of the crime.

19. The Trial Court erred and violated his Fifth, Eighth and Fourteenth Amendment Rights in refusing to permit inquiry into whether the jurors held the belief that the Defendant would be executed if the jury were to impose the death sentence.

20. The Trial Court erred in denying Defendant the opportunity to *voir dire* the jury regarding

specific mitigation circumstances about which they would be generally instructed, and further erred in denying Defendant's motion to exclude those jurors that were unable to consider specific mitigating circumstances in sentencing.

21. The Trial Court erred in denying the Defendant's motion for *in-camera* requests for expert witnesses in violation of his Fourth, Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution and rights protected by the Virginia Constitution.

22. The Trial Court erred in denying Defendant's motion for a private investigator to aid the defense in the preparation of trial in violation of his Fifth and Fourteenth Amendment Rights and his rights protected by the Virginia Constitution.

23. The Trial Court erred in denying the Defendant's motion that it review evidence to determine whether evidence was or was not exculpatory rather than leaving such determination to the Commonwealth Attorney in violation of his Sixth and Fourteenth Amendment Rights and rights protected by the Virginia Constitution and in violation of the discovery rules of this court.

24. The Trial Court erred in permitting hearsay testimony, regarding personal information about the victim, via the first page of the medical examiners reports without redacting hearsay portions.

25. The Trial Court erred in sustaining objections regarding the testimony about the lack of fingerprints left by Mr. Ramirez in the 7-11; as to the specific location of Mr. Ramirez on dates

preceding this incident; in denying the Defendant's probing into the background of Commonwealth witness Mr. Ramirez, and in denying the defendant the opportunity to examine Mr. Ramirez and Mr. Singh regarding other offenses in which the witnesses were involved thereby denying him right of confrontation in violation of the Sixth Amendment of the Constitution and rights protected by the Virginia Constitution.

On November 5, 1993, the conviction was affirmed. *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1993). The court noted that Assignments 7, 17, 18, 19, 20, and 24 were not briefed and concluded that those issues had been waived. With regard to the remaining issues, the court addressed and ruled on the issues on the merits.

Following denial of the appeal, a petition for certiorari was filed in the United States Supreme Court. While the petition addressed multiple issues, including discovery, unadjudicated misconduct, constitutionality of the death sentence, expert assistance, and potentially exculpatory evidence, only one assignment was significant: "Whether the Court's refusal to respond to [the] jury inquiry as to Defendant's parole status violates the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution."

There was no action for several months, but on June 17, 1994, the United States Supreme Court decided the case of *Simmons v. South Carolina*, 512 U.S. 154 (1994), and ruled that where a defendant's future dangerousness is at issue and state law prohibits a defendant's release on parole, due process requires the sentencing jury to be informed that the defendant is parole ineligible.

Three days later, on June 20, 1994, certiorari in petitioner's case was granted and the case was remanded to the Virginia Supreme Court for further consideration based upon the Supreme Court's opinion in *Simmons. Ramdass v. Virginia*, 512 U.S. 1217 (1994).

As presented by petitioner to the Supreme Court of Virginia on remand, the sole issue in *Simmons* was "[w]hether the due process clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." Respondent argued that *Simmons* was not raised in the trial court; that petitioner was ineligible for parole and *Simmons*, therefore, did not apply; and that *Simmons* was irrelevant because the sentencer can always consider parole ineligibility.

On November 4, 1994, the Supreme Court rejected petitioner's claim, found that petitioner was ineligible for parole, and concluded that *Simmons* did not apply. *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994).

Once again a petition for writ of certiorari was filed in the Supreme Court of the United States, raising many of the same issues originally presented, but the petition was rejected on April 24, 1995. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

On May 11, 1995, counsel was appointed to pursue a petition for writ of habeas corpus in the courts of the Commonwealth.

On August 30, 1995, petitioner instituted a petition for writ of habeas corpus in the Virginia Supreme Court alleging the following broad categories as grounds for relief:

1. Denial of effective assistance of counsel for reasons addressing trial strategy (or lack thereof), improper *voir dire*, venue, jury sequestration, handling of defense experts, handling of evidence, improper preparation for examination of prosecution experts, inadequate pretrial investigation, improper handling of a co-defendant's testimony, objections addressing the murder weapon and the forensics expert, and improper handling of the sentencing phase.

2. Prosecutorial misconduct, consisting of the withholding of exculpatory evidence; use of highly prejudicial evidence (in the form of photos, the autopsy report, unadjudicated misconduct, and a co-defendant's sentence); and improper evidence regarding parole.

3. Trial court error in the form of a delayed finding of guilt on the robbery charge; failure to strike members of the jury panel challenged for cause; failure to require the prosecution to produce certain purportedly exculpatory evidence; admission of evidence that was either highly prejudicial or not preceded by a proper foundation; instructional errors, a *Simmons* error; and the denial of an investigator.

4. The Virginia Supreme Court proportionality review was inadequate.

An *ex parte* motion for expert assistance and an investigator was denied on January 19, 1996, and the habeas petition was denied on March 18, 1996, without an evidentiary hearing.

On April 19, 1996, counsel filed a petition for rehearing in the state habeas proceeding, alleging as grounds for the rehearing that petitioner was denied the effective assistance of counsel (for a variety of reasons previously presented), that the prosecution engaged in misconduct prejudicial to petitioner, and that the trial court denied petitioner's constitutional rights in numerous respects. Some issues were raised for the first time, and the *Simmons* claim is well articulated. The petition for rehearing was denied June 7, 1996.

Following denial of the petition for rehearing, the Circuit Court of Fairfax County set petitioner's execution for August 28, 1996.

On June 25, 1996, a motion by petitioner to stay execution was filed, but the motion was denied by the Virginia Supreme Court on July 17, 1996.

On August 14, 1996, incident to plans to present a federal habeas petition, petitioner moved for a stay of execution and for leave to proceed *in forma pauperis*, and for appointment of counsel in federal court.

On August 15, 1996, the execution was stayed. Thereafter, on September 11, 1996, counsel was appointed for the purpose of filing the current action.

On February 14, 1997, the present petition was filed. On March 11, 1997, an amended petition was filed, and that is the pleading upon which all further actions have

been based. The amended petition presents, in the broadest possible terms, the *Simmons* issue; claims of denial of effective assistance of counsel; claims based on the alleged denial of a mental health expert and other experts; the denial of exculpatory material sought from the prosecution; the absence of due process because the Virginia sentencing statute is unconstitutional on its face; that the death penalty statute is unconstitutional on its face; and that prejudicial errors of a constitutional dimension were committed during the penalty phase.

A response to the petition and a motion to dismiss were filed on behalf of the respondent on April 28, 1997.

On June 3, 1997, petitioner's response to the motion to dismiss was filed.

On June 26, 1997, the respondent's reply brief was filed.

The issue are [sic] now ripe for adjudication.

D. Grounds Raised

Petitioner asserts many claims in support of his request for relief under 28 U.S.C. § 2254. For ease of identification in addressing the numerous issues in the body of the opinion, the Court has placed in parentheses the letter and/or number designation used in the petition next to the Court's numbering. Subparts of major topics are presented selectively, based upon whether the subpart is simply assumed to be an element of the principal claim, e.g. A.2.a. (the Virginia Supreme Court rejection of

the *Simmons* claim on remand was *ultra vires*) or constitutes a separate and independent claim, e.g. C.5.a. (failure of trial counsel to conduct adequate *voir dire*).

The issues presented in Section III of the petition are:

1. (A) The Court's failure to allow consideration of petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth Amendments.

2. (B) Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

3. (C) Petitioner was denied effective assistance of counsel.

   a. (C(2)) Defense counsel's trial "strategy" was inadequate.

   b. (C(2)(a)) Counsel unreasonably advised petitioner not to testify.

   c. (C(2)(b)) Trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position.

   d. (C(2)(c)) Trial counsel failed to challenge the testimony of the Commonwealth's medical examiner.

   e. (C(2)(d)) Trial counsel failed to adequately cross-examine the prosecution's "firearms identification" expert.

   f. (C(2)(e)) Expert assistance to educate counsel was neither sought nor obtained.

4. (C(3)) Trial counsel did not object to co-defendants' testimony about his sentence for the murders.

5. (C(4)) Trial counsel failed to establish petitioner's parole ineligibility by failing to continue the case for a long enough time to establish the requisite prior convictions.

6. (C(5)) Additional reasons why assistance of trial counsel was ineffective:

   a. (C(5)(a)) Trial counsel failed to conduct adequate *voir dire*.

   b. (C(5)(b)) Trial counsel effectively conceded the only aggravating factor in the penalty phase.

   c. (C(5)(c)) Trial counsel failed to prepare adequately for the penalty phase of the capital murder trial.

7. (D) Petitioner was unreasonably and unfairly deprived of the assistance of an investigator and a doctor.

8. (E) Petitioner was unreasonably denied the opportunity to proceed *in camera* with regard to experts.

9. (F) Petitioner was denied exculpatory material by the prosecution.

10. (G) The Virginia death penalty statutes violate the Sixth, Eighth, and Fourteenth Amendments.

11. (H) Petitioner was denied his right of confrontation in violation of the Sixth Amendment of the United States Constitution.

12. (I) Trial counsel violated petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

13. (J) The Virginia Supreme Court arbitrarily and unreasonably performed its mandatory review of petitioner's death sentence in violation of the Eighth and Fourteenth Amendments.

14. (K) Virginia's capital murder sentencing statute is unconstitutional.

The following chart correlates the grounds alleged in the federal habeas corpus petition with the corresponding claims in the state habeas corpus petition.

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Claim 3.a. (C(2))	p. 66	Not raised	
Claim 3.b. (C(2)(a))	p. 68	Claim IV.A.20	p. 15
Claim 3.c. (C(2)(b))	p. 69	Claim IV.A.20	p. 15
Claim 3.d. (C(2)(c))	p. 70	Claim IV.A.8 & 9	pp. 9,10
Claim 3.e. (C(2)(d))	p. 73	Claims IV.A.13, 16, 17, 18	pp. 12, 13, 14
Claim 3.f. (C(2)(e))	p. 76	Claims IV.A.5, 7, 15	pp. 6, 8, 13
Claim 4 (C(3))	p. 81	Claim IV.A.12	p. 12
Claim 5 (C(4))	p. 82	Not raised	
Claim 6.a. (C(5)(a))	p. 86	Claim IV.A.2	p. 4
Claim 6.b. (C(5)(b))	p. 92	Claim IV.A.21	p. 15
Claim 6.c. (C(5)(c))	p. 94	Claim IV.A.23	p. 16
Claim 7 (D)	p. 95	Claim IV.C.14	p. 30
Claim 8 (E)	p. 102	Not raised in habeas corpus petition/ raised on direct appeal	
Claim 9 (F)	p. 117	Claims IV.B.1 and IV.C.3	p. 17, 23
Claim 10 (G)	p. 121	Not raised in h/c pet/raised on direct appeal	
Claim 11 (H)	p. 124	Not raised in h/c pet/raised on direct appeal	
Claim 12 (I)	p. 126	Claim IV.A.19 and IV.C.9, 12	pp. 14, 26, 27
Claim 13 (J)	p. 132	Claim IV.D	p. 31
Claim 14 (K)	p. 139	Not raised in h/c pet/raised on direct appeal	

*Some of the claims are in different form than in the federal petition, but the issue was preserved.

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II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Motion to Dismiss

In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the complaint is construed in the light most favorable to the plaintiffs and their allegations are taken as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969). The complaint should not be dismissed unless it appears to a certainty that the plaintiff can prove no facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1993); *Bruce v. Riddle*, 631 F.2d 272, 273-74 (4th Cir. 1980). The courts must construe the complaint liberally in favor of the plaintiffs, even if recovery appears remote and unlikely. *See Jenkins*, 395 U.S. at 421. In ruling on a 12(b)(6) motion, the court primarily considers the allegations in the complaint but may consider attached exhibits and documents incorporated by reference. *See Simons v. Montgomery County Police Officers*, 762 F.2d 30, 31 (4th Cir. 1985), *cert. denied*, 474 U.S. 1054 (1986); *Wolford v. Budd Co.*, 149 F.R.D. 127, 129-32 (W.D. Va. 1993).

B. Standard of Review in Habeas Corpus Proceedings.

In 1996, Congress enacted, and the President signed into law, the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. 104-132, 110 Stat, 1214 (April 24, 1996)

(hereinafter "AEDPA"). The AEDPA provided habeas reform in both capital and noncapital cases. Section 107 of the AEDPA added a new chapter to Title 28 establishing special procedures in capital cases. 28 U.S.C. §§ 2261-2265. Among them was the establishment of a six-month statute of limitation for the filing of a petition and a further limitation within which to act on any such application.

This Court has previously determined that section 107 of the AEDPA does not apply in this case because "on the date Ramdass's state habeas counsel was appointed, Virginia was not in compliance with the requirements of the AEDPA because it did not have a mandatory appointment mechanism," nor did it meet the federal statutory requirements for compensation and payment of reasonable litigation expenses for counsel appointed to indigent death row inmates and only arguably met the competency standards. *Ramdass v. Netherland*, 2:96CV831, Order of December 6, 1996. Similar rulings have been arrived at in *Wright v. Angelone*, 944 F. Supp. 460 (E.D. Va. 1996); *See also Satcher v. Netherland*, 944 F. Supp. 1222, 1238 (E.D. Va. 1996); *Breard v. Netherland*, 949 F. Supp. 1255, 1261-62 (E.D. Va. 1966).

However, section 104 of the AEDPA, which amends 28 U.S.C. § 2254, governing noncapital habeas claims, does apply. As the Supreme Court noted in *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), "[t]he statute reveals Congress's intent to apply the amendments to chapter 153 [28 U.S.C. § 2241 *et seq.*] only to such cases as were filed after the statute's enactment. . . . " *Id.* at 2063. Justice Rehnquist goes on to say "[w]e read . . . section 107(c) . . . as indicating implicitly that the amendments to chapter 153

were assumed and meant to apply to the general run of habeas cases only when those cases had been filed after the date of the Act." *Id.*

In *Mu'Min v. Pruett*, 125 F.3d 192 (4th Cir. 1997) and *O'dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) the Fourth Circuit declined to apply the provisions of the AEDPA because each habeas petition was filed prior to the effective date of the statute. Thus, litigants in those cases were entitled to the benefit of the pre-AEDPA standards.

Petitioner, however, is governed by "the considerably more demanding standards . . . imposed on habeas petitioners" by the AEDPA. *O'dell*, 95 F.3d at 1255 n.36.

As applied to petitioner, 28 U.S.C. § 2254(d) reads

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The language of the statute is important; the legislative "and's" and "or's" must be clearly understood because for petitioner to prevail, he must establish that his claim was adjudicated on the merits in state court

proceedings and resulted in a decision and that the decision was contrary to or involved an unreasonable application of clearly established federal law; or that his claim was adjudicated on the merits in a state court proceeding and resulted in a decision, and the decision was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Because many legal conclusions arise out of a specific factual context, 28 U.S.C. § 2254(e)(1) is particularly important:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant *shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.*

28 U.S.C. § 2254(e)(1) (emphasis added).

To underscore the deference intended to be accorded the factual findings of a state court, the statute goes on to provide that when an applicant has failed to develop the factual basis of a claim in state court proceedings, an evidential hearing "shall not" be conducted unless a petitioner establishes that the claim relies on a new, retroactively-applied constitutional rule, that the fact could not be previously discovered with due diligence or that "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B).

C. Petitioner's Claims are Exhausted and are Subject to Federal Review.

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that – (A) the applicant has exhausted the remedies available in the courts of the State; or (B)(I) there is an absence of available State corrective process; or (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

28 U.S.C. § 2254(b)(1).

The exhaustion requirement dictates that a petitioner must first present his claims for relief to state courts before a petition for habeas corpus may be granted by the federal courts. A claim raised in a federal petition for writ of habeas corpus must be essentially the same claim as that presented in state proceedings. *Pitchess v. Davis*, 421 U.S. 482 (1975); *Picard v. Conner*, 404 U.S. 270, 275-76 (1971). *See also Anderson v. Harless*, 459 U.S. 4, 6 (1982); *Satcher v. Pruett*, 126 F.3d 561, 573 (4th Cir. 1997); *Mu'Min v. Pruett*, 125 F.3d 192, 197-98 (4th Cir. 1997); *Duncan v. Henry*, 115 S.Ct. 887, 888 (1995).

Not all of petitioner's claims were raised on direct appeal or in his state habeas action. However, for purposes of the exhaustion requirement, all of petitioner's claims are deemed to be exhausted because Virginia statutes, rules, and case law preclude raising issues for the first time, with certain notable exceptions (i.e. ineffective assistance of trial counsel) in a habeas proceeding.

Because any claims presented by petitioner which were not raised on direct appeal are barred by the contemporaneous objection requirement of Rule 5:25, Rules of the Supreme Court, and applied through *Slayton v. Parrigan*, 205 S.E.2d 680 (Va. 1974), and because any issues not raised in petitioner's original state habeas petition may not be considered in any subsequent petition, the claims are considered both exhausted and procedurally barred. Va. Code Ann. § 8.01-654(B)(2); *Gray v. Netherland*, 116 S.Ct. 2074, 2080 (1996); *Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Castille v. Peoples*, 489 U.S. 346, 351 (1989); *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990); *Ferguson v. Cox*, 464 F.2d 461, 463 (4th Cir. 1972).

Respondent concedes that "[a]ll . . . claims are exhausted within the meaning of 28 U.S.C. § 2254(b) . . . ," and the Court agrees.

D. Some of Petitioner's Claims are Procedurally Defaulted

Under Virginia law, a claim included in a petition for habeas corpus will be barred if an objection was not raised at trial and the objection presented on direct appeal. In *Coppola v. Warden of Virginia State Penitentiary*, 282 S.E.2d 10 (Va. 1981), the Supreme Court of Virginia held that to preserve an issue for appeal, and for a habeas corpus proceeding, the issue must be timely objected to at trial. Rule 5:25 of the Supreme Court of Virginia states the contemporaneous objection rule: "Error will not be sustained to any ruling of the trial court or the commission

before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling. . . . " Va. S.Ct. R. 5:25.

The Supreme Court has stated that: "Under Virginia law, failure to raise a claim on direct appeal from a criminal conviction ordinarily bars consideration of that claim in any subsequent state proceeding." *Smith v. Murray*, 477 U.S. 527, 533 (1986). The Fourth Circuit has held that if a claim is procedurally barred in Virginia courts because it was not brought on direct appeal, it will also be barred in the federal system. *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990).[2] In *Whitley v. Bair*, 802 F.2d 1487 (4th Cir. 1986), the court held that the failure of an inmate to directly appeal his conviction to the Supreme Court deprives

> the Virginia Supreme Court of the opportunity to rule on the merits of his claims. We consider such failure to constitute a violation of the requirements of Rule 5:21, which applies to appeals of all Virginia cases, civil or criminal, and conclude that such violation constitutes a procedural default sufficient to preclude federal court review of the merits. . . .

Id. at 1502 (*citing* Va. S. Ct. R. 5:21, *repealed and reinstated in substantially similar form as*, Va. S.Ct. R. 5:17, 5:25).

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[2] The court in *Bassette* relied on Virginia Code section 8.01-654 (B)(2). *Bassette*, 915 F.2d at 936. Section 654 (B)(2) states: "No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition." Va. Code Ann. § 8.01-654 (B)(2) (Michie 1992).

In *Slayton*, the Virginia Supreme Court stated a similar proposition: "[a] petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error." *Id.* at 682. The Supreme Court of the United States addressed the same issue in *Coleman v. Thompson*, 501 U.S. 722 (1991). The Court held that the doctrine of procedural default will bar a federal habeas petition when a prisoner fails to meet a state procedural requirement. *Id.* at 750. Speaking for the Court, Justice O'Connor said:

> We now make it explicit: In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice. . . . We now recognize the important interest in finality served by state procedural rules, and the significant harm to the States that results from the failure of federal courts to respect them.

Id. at 750.

More recently, the issue has been addressed in *Gray*; *Satcher v. Pruett*, 126 F.2d 561 (1997); and *Mu'Min*, 125 F.3d 192 (4th Cir. 1997).

In *Gray v. Netherland*, 116 S.Ct. 2074 (1996), the Court, addressing a *Brady* claim, raised neither on direct appeal nor in the original state habeas corpus proceeding, stated:

> [T]he procedural bar which gives rise to exhaustion provides an independent and adequate state-law ground for the conviction and sentence, and thus prevents federal habeas corpus review of the defaulted claim, unless the petitioner can demonstrate cause and prejudice for the default.

In Virginia, "[n]o writ [of habeas corpus ad subjiciendum] shall be granted on the basis of any allegation that facts of which petitioner had knowledge at the time of filing any previous petition." Va. Code Ann. § 8.01-654(B)(2) (1992). Because petitioner knew of the grounds of his *Brady* claim when he filed his first petition, § 8.01-654(B)(2) precludes review of petitioner's claim in any future state habeas proceeding. Because petitioner makes no attempt to demonstrate cause or prejudice for his default in state habeas proceedings, his claim is not cognizable in a federal suit for the writ.

> *Id.* at 2080-81 (citations omitted).

In *Mu'Min*, petitioner sought to avoid the burden of procedural default by arguing that the rule in *Slayton* does not preclude federal consideration because it is not independent of federal law and that even if *Slayton* constitutes an adequate and independent ground for rejecting his claims, they were, nevertheless, implicitly considered and rejected by the Supreme Court of Virginia during its mandatory review of his death sentence. Both arguments were rejected.

The court noted that *Slayton* has been relied upon in the Fourth Circuit, e.g. *Bennett v. Angelone*, 92 F.3d 1336,

1343 (4th Cir. 1996) and is regularly cited in Virginia opinions. *Mu'Min*, 125 F.3d at 197.

Moreover, the federal court is required to dismiss a procedurally defaulted claim absent a showing of justifiable cause resulting in actual prejudice. *Wainwright v. Sykes*, 433 U.S. 72 (1977). As the Fourth Circuit stated in *Satcher*, in order for a procedurally defaulted claim to be considered, petitioner "must demonstrate that the error worked to his 'actual and substantial disadvantage,' not merely that the error created a 'possibility of prejudice.' *Id.* at 572, citing *Murry* [sic] *v. Carrier*, 477 U.S. 478, 494 (1986); *Poyner v. Murray*, 964 F.2d 1404, 1425 (4th Cir. 1992). Petitioner has not made a showing of justifiable cause for his failure to appeal any of the defaulted issues to the Supreme Court of Virginia, either on direct appeal or in his original habeas petition. Therefore, the issue of actual prejudice need not be addressed.

Respondent asserts that numerous claims by petitioner are procedurally defaulted. The Court concurs in some instances, but not in others, and accordingly, each of respondent's assertions will be dealt with individually.

The Court finds that Claim 9 is procedurally defaulted, to the extent that it is founded upon refusal of the trial court to order production of a co-defendant's prior inconsistent statement or upon the premise of prosecutorial misconduct in the denial of allegedly exculpatory material. No such issues were raised on direct appeal. Instead, all direct appellate claims were addressed in the context of trial court error (denial of polygraph information for impeachment purposes, denial of material regarding future dangerousness, and refusal

to examine prosecutorial work product, in the form of witness statements, *in camera*).

The claim of prosecutorial misconduct was first raised in the state habeas petition (Claim B(1)) and presented the issues of nondisclosure of a prior inconsistent statement by a co-defendant, and the purported failure to reveal the location at which a bullet was found or show trial counsel a particular photograph of the murder scene.

Both state habeas claims were rejected – the claim of prosecutorial misconduct by application of *Slayton*, and the claim of trial court error by application of *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970) ("[a]bsent a change of circumstances, previous determination of the issues by either state or federal courts will be conclusive." *Id.* at 274. Any objections founded upon purported prosecutorial misconduct should have been made at the time of or during the course of the trial, and presented to the Virginia Supreme Court on direct appeal. The application of *Slayton* to these claims in the state habeas proceeding is consistent with prior judgments by the court. The present claim continues petitioner's search for relief, based upon polygraph test results for one of the co-defendants, and again raises the issue of the trial court's failure to review the prosecution's file *in camera*. Polygraph material is not accessible under the *Brady* banner, when the results are inadmissible at trial, *Wood v. Bartholomew*, 516 U.S. 1, 10 (1995), and Virginia law prohibits use of polygraph results for impeachment purposes under any circumstances. *Robinson v. Commonwealth*, 341 S.E.2d 159, 167 (Va. 1986).

The portion of Claim 9 addressed to the refusal of the trial court to review the prosecution's file *in camera* to determine the presence of exculpatory material is addressed later in this opinion.

Claim 13, the sufficiency of the Virginia Supreme Court proportionality review, was dismissed by the Supreme Court of Virginia on the basis of *Slayton*. However, the issue of the appropriateness of the death penalty, and whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, or whether it was excessive or disproportionate to a penalty in similar cases was addressed on direct appeal; the subject of the Supreme Court's original decision, *Ramdass v. Commonwealth*, 426 Va. 413, 426-27 (1993); and resubmitted in the state habeas corpus proceeding. Because *Slayton* addresses both the issue of objections not timely made and the use of a petition for writ of habeas corpus as a substitute for an appeal or writ of error, and because the Virginia Supreme Court was entitled to rely upon its own decision addressing the issue of whether the sentence was proportional and free of inflamed judgment by the jury, this Court finds that the issue has been appropriately preserved and is not procedurally defaulted.

Respondent alleges that Claim 1, the *Simmons* issue, has not been raised and is, therefore, procedurally defaulted. The Court disagrees. Regardless of the precise form or nature of the argument, there is one issue which has been preserved throughout this case, since it surfaced in the capital sentencing phase of the trial, and that is whether the sentencing jury was entitled to know petitioner's parole eligibility status. The issue was presented on direct appeal, and ruled upon by the Virginia Supreme

Court. *Ramdass*, 246 Va. at 426. *Certiorari* was granted by the United States Supreme Court on the sole issue of whether the jury was entitled to know petitioner's parole eligibility status when the Commonwealth relied upon the sole aggravating factor of future dangerousness. The matter was subsequently addressed by the Virginia Supreme Court and petitioner's claim rejected on the sole ground that petitioner was parole ineligible because he had not received the requisite number of convictions. *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994). The claim was renewed in the state habeas proceeding as Claim C(13) and rejected under the rule in *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970). The Court finds that this claim is not procedurally defaulted, and it will be addressed on the merits.

Claim 2, denial of the constitutional right to the assistance of a mental health expert, is procedurally defaulted. No issue addressing denial of the "right to the assistance of a mental health expert" was presented on direct appeal. In the state habeas proceeding, trial counsel were accused of being ineffective for failing to secure a mental health expert who would assist in petitioner's defense, (Claim A(4)), but a constitutional claim based on the purported failure to make such assistance available was not made. *See Ake v. Oklahoma*, 470 U.S. 68 (1985). The present claim constitutes an attack upon the alleged biases of the expert appointed by the court to assist in the preparation of such mental health issues as might be present. However, counsel for petitioner have not presented the issue in any context fairly raised in either the trial court or the Virginia Supreme Court. Absent a showing of cause and prejudice for petitioner's failure to assert

the claim in state court, he is not entitled to do so now. *Slayton; Mu'Min v. Pruett*, 125 F.3d 192, 196 (4th Cir. 1997). The claim is procedurally defaulted.

Claim 3(a), denial of effective assistance of counsel because of an inadequate defense strategy, is procedurally defaulted. The claim was not raised in the state habeas corpus action, the first occasion on which it could have been raised, and it may not now be presented for the first time.

Likewise, Claim 3(b), alleging that petitioner was denied the effective assistance of counsel because of trial counsel's advice to petitioner not to testify, is procedurally defaulted. In the state habeas petition, habeas counsel alleged that trial counsel failed to put on evidence, (Claim A(20)), but in the course of presenting the claim stated only that trial counsel "met with petitioner and talked him out of testifying," without alleging that such action constituted ineffective assistance of counsel. This Court is not required to assume that the language state habeas counsel selected was to be viewed in the pejorative sense. The current claim asserts that trial counsel were negligent, and that they "unreasonably recommended that [petitioner] not testify." (Pet. at ¶ 158.) That is a marked departure from the state habeas claim and is, therefore, procedurally defaulted. *Mu'Min; Duncan v. Henry*, 513 U.S. 364, 366 (1995) (*per curiam*).

Respondent asserts that Claim 3(f), ineffective assistance of counsel by virtue of trial counsel's failure to obtain experts to assist in the defense of the case and rebut prosecution experts, is procedurally defaulted as to claims pertaining to the location of the bullet. The Court

agrees. However, the other claims were fairly raised in the state habeas corpus petition and rejected by the Virginia Supreme Court on the merits. The issues have been preserved for appeal.

Respondent asserts that Claim 5, ineffective assistance of counsel for failing to establish parole ineligibility by failing to request rescheduling of the trial and by failure to challenge the determination that petitioner was not eligible for parole, are procedurally defaulted. The Court agrees, as to the former issue, but disagrees as to the latter. Neither issue was raised in the state habeas proceeding in the context of ineffective assistance of counsel, even though at the time the state habeas petition was filed, the case had been remanded to the Virginia Supreme Court by the United States Supreme Court and dismissed on a supplemental opinion, *Ramdass v. Commonwealth*, 248 Va. 518 (1994), on the grounds that petitioner was not eligible for parole. Thus, both of the issues raised in the current proceeding were known to state habeas counsel, and their failure to raise the ineffective assistance of counsel claim results in the claim being procedurally defaulted. However, the *Simmons* issue was expressly preserved.

Respondent asserts that Claim 6(a), alleging ineffective assistance of counsel via inadequate *voir dire* prior to empaneling of the jury, was not raised. However, the Court finds that matter was addressed in the state habeas petition, Claim A(2), and dismissed on the merits. Where the claim is that counsel was ineffective because of an inadequate *voir dire* examination, the fact that the tenor of the argument may change does not render the matter procedurally defaulted. Current counsel are simply not

bound to adhere to the arguments of state habeas counsel which have already been rejected by one tribunal. The state was put on notice, the issue was preserved, and the claim is not procedurally defaulted and will be addressed on the merits.

Respondent asserts that Claim 10, addressing the issue of the constitutionality of Virginia's death penalty sentencing statutes, has not been raised, but the Court finds otherwise. The issues were raised on direct appeal in the context of the adequacy of the proportionality review in the state habeas corpus action, and the Eighth and Fourteenth Amendment issues arising out of the Virginia death penalty have been properly preserved and will be considered on the merits.

Finally, respondent alleges that Claim 12, the admission of unadjudicated misconduct in the penalty phase in violation of petitioner's constitutional rights, was not raised in the state court. However, the matter was raised on direct appeal and addressed in the first Virginia Supreme Court opinion, *Ramdass*, 246 Va. at 418; raised in the state habeas petition and dismissed under the rule in *Hawks*, (Claim C(12)); and preserved for consideration by this Court. The claim is not procedurally defaulted.

The remainder of the report and recommendation will be addressed to the claims which are not procedurally defaulted.

E. Claims Addressed on the Merits.

1. General

Judge Wilkinson, in the course of addressing numerous purported constitutional claims in a death penalty case said: "It is becoming all too commonplace to charge even diligent counsel in the midst of difficult circumstances with the adverse outcome in a capital case." *Bunch v. Thompson*, 949 F.2d 1354, 1363 (4th Cir. 1991). The case involved a petitioner who shot his girlfriend in cold blood; ransacked her house and stole expensive jewelry; and before leaving, knotted a scarf around the decedent's neck and pulled her unconscious body to a door where he hung her by the scarf from the door knob. *Id.* at 1358. The autopsy established that her death was a combination of the gunshot wound to the head and suffocation as a result of the hanging. *Id.* The complaints in that case ran the gamut: ineffective assistance of counsel, instructional errors, and a biased jury. The tenor of the comment could be modified to state that it has become commonplace, in every capital case, to assume that some error of constitutional dimension has lead [sic] to a decision that the defendant is guilty of the capital offense and that the conduct and background of the guilty party justifies the death penalty. Judge Wilkinson, and other jurists called upon to deal with death penalty cases, find their experience to be otherwise.

It is, therefore, appropriate to again turn to the language of Judge Wilkinson in *Sherman v. Smith*, 89 F.3d 1134 (4th Cir. 1996), where he stated:

> Criminal defendants in this country are entitled to a fair, but not a perfect trial. "[G]iven the

> myriad safeguards provided to assure a fair trial, and taking into account the reality of the human fallibility of the participants, there can be no such thing as an error-free, perfect trial," *United States v. Hasting*, 461 U.S. 499, 508 (1983) and the Constitution does not demand one. This focus on fairness, rather than on perfection, protects society from individuals who have been duly and fairly convicted of crimes, thereby promoting "public respect for the criminal process." *De Lawrence v. Van Arsdale*, 475 U.S. 673, 681 (1986).

Sherman at 1137.

The statement is made in the context of the language of *Arizona v. Fulminante*, 499 U.S. 279 (1991), in which the Supreme Court noted "that a constitutional error does not automatically require reversal of a conviction," noting that "the Court has applied harmless-error analysis to a wide range of errors and has recognized that most constitutional errors can be harmless."[3] *Id.* at 306. The more difficult issue has always been what standard to apply in determining whether an error is harmful. Judge Wilkinson addressed the error in *Sherman*, using the phrase "structural errors" to describe errors so severe as to render a trial inherently unfair and thus, not subject to a harmless error analysis, the only correct analysis to be applied to the claims now before the Court.

---

[3] Both the Supreme Court in *Fulminante*, 499 U.S. at 306-07, and Judge Wilkinson in *Sherman*, 89 F.3d at 1137, catalogued errors deemed to be constitutional in scope but harmless in the effect on the outcome of trial.

In *Brecht v. Abrahamson*, 507 U.S. 619 (1993), the Supreme Court had to choose between competing standards for harmless error analysis. In conflict was the standard articulated in *Chapman v. California*, 386 U.S. 18 (1967), necessitating a finding that an error "was harmless beyond a reasonable doubt," *id.* at 24, juxtaposed against *Kotteakos v. United States*, 328 U.S. 750 (1946), in which the Court required that for habeas relief to be granted, the error must have "had substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 776.

The plurality decision, adopting the *Kotteakos* standard by a five to four vote, but yielding six separate opinions, four in dissent, is the standard by which this Court is governed. The opinion, and the standard which is adopted, is merely a reflection of the principle that collateral review is different from direct review, *id.* at 633, and that direct review is the principal avenue for challenging a conviction. *Id.* The *Brecht* standard was applied in *Sherman* and is applicable to the case now before the Court.

2. Petitioner did not receive ineffective assistance of counsel.

a. Applicable standard

Probably the only easy aspect of the matter before the Court is articulating the standards upon which claims of ineffective assistance of counsel are to be judged. The standards are established in *Strickland v. Washington*, 466 U.S. 668 (1984), and have been applied on numerous occasions by this Court.

In *Strickland*, the Supreme Court approved as the proper standard for attorney performance that of "reasonably effective assistance". *Id.* at 687. The Court stated:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.
>
> . . . .
>
> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 686-87.

There are, therefore, two elements of the *Strickland* test, each of which must be met before the conduct of counsel can be found to be constitutionally defective. First, petitioner must show that he received deficient legal representation, measuring the competency of his counsel against what "an objectively reasonable attorney

would have done under the circumstances existing at the time of the representation," *Savino v. Murray*, 82 F.3d 593, 599 (4th Cir. 1996), and petitioner must show actual prejudice, that is, he "must demonstrate that the error worked to his 'actual and substantial disadvantage,' not merely that the error created a 'possibility of prejudice.' " *Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir. 1997) (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986); *Poyner v. Murray*, 964 F.2d 1404, 1425 (4th Cir. 1992)).

In analyzing trial counsel's performance under the "deficiency" prong of *Strickland*, a reviewing court is required to be highly deferential in scrutinizing counsel's tactics. *Bennett v. Angelone*, 92 F.3d 1336, 1349 (4th Cir. 1996) (citing *Strickland*, 466 U.S. at 689). Further, reviewing courts are admonished to "not permit the benefit of hindsight to impact . . . review," *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995) (citing *Strickland*, 466 U.S. at 689).

Respondent argues that in reviewing petitioner's ineffective counsel claims "this Court not only is limited to the facts as they were presented to the Virginia Supreme Court, but also is limited to determination of whether the state court reasonably rejected the claim under *Strickland v. Washington*." (Resp. Mem. at 16 (citation omitted).) The Court does not agree.

First, "[w]hether counsel's performance was constitutionally adequate is a mixed question of law and fact . . . ," and on appeal is reviewed *de novo*. *Savino*, 82 F.3d at 598; *Stout v. Netherland*, No. 95-4008, 4007 1996 WL 496601 (4th Cir. September 3, 1996); *see also Ostrander v. Green*, 46 F.3d 347, 354 (4th Cir. 1995); *Poyner*, 964 F.2d at 1416.

Second, this Court is not relegated to the status of a judicial rubber stamp on any issues that may have "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht* at 637; *Kotteakos* at 776. Inadequate representation, when it occurs, frequently has a "substantial and injurious effect."

Before addressing the individual claims of ineffective assistance, it is appropriate to consider, at the threshold, the level of effort extended on petitioner's behalf by trial counsel.

The record reveals that trial counsel filed a total of more than thirty motions on petitioner's behalf, addressing matters of evidence, transcripts, the size of the jury panel, a proposed jury survey, appointment of a mental health expert, discovery, a request for additional attorneys, exculpatory evidence, identification of experts, sentencing, the constitutionality of the death penalty, and other matters relevant to petitioner's case. There were motion hearings on September 25, 1992; November 2, 1992; December 8, 1992; and January 8, 1993.

Counsel was given great latitude by the trial court during *voir dire* and extensively questioned members of the jury, successfully challenging a number of panel members. However, as might be expected, not all of counsel's challenges were upheld. That there were some panel members unacceptable to the defense is neither unusual nor unconstitutional.

Trial counsel were faced with two eye-witness co-defendants, the recovery of the gun used in the killing, and medical evidence that the decedent was shot at point-blank range, all in the guilt phase of the trial.

During the sentencing phase of the trial, counsel were faced with the testimony of a victim shot and wounded only a week before the murder of Kayani, the testimony of a brother who was in prison at the same time as petitioner, evidence of an extensive criminal history for such a young man, and a mother able to provide only minimal assistance.

Trial counsel had terrible facts to work with, an unsophisticated client with a history of escalating propensities for violence, and difficult choices at every turn.

Finally, it should not be forgotten that trial counsel were successful in obtaining a writ of *certiorari* in the United States Supreme Court and preserving a significant issue arising out of the Supreme Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994).

It is a given that with the perfect clarity of hindsight, some things might be done in a different manner if counsel were given a second opportunity to try the case. The Court is, however, bound by the record.

b. <u>The issue of "trial strategy" is irrelevant.</u>

As the Fourth Circuit has noted, a lawyer's performance is entitled to a strong presumption of reasonableness. *Evans v. Thompson*, 881 F.2d 117, 124 (4th Cir. 1989); *Pruett*, 996 F.2d at 1568. *Strickland* advises courts to apply a "heavy measure of deference to counsel's judgments," *Strickland* at 691, a sentiment embraced by the Fourth Circuit in *Satcher* and reflected in a series of earlier opinions from this Court. *See also Stout*, 1996 W.L. 496601 at *7

(counseling that courts "resist [ ] the temptation to second-guess the adequacy of counsel's strategy based solely on the fact that the strategy has resulted in an adverse outcome"); *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir. 1995) ("We emphasize . . . that neither Bell nor any other aggrieved defendant can manipulate this forum to construe a reasonable but ultimately unsuccessful strategy in his favor. Standing alone, unsuccessful trial tactics neither constitute prejudice nor definitely prove ineffective assistance of counsel"); *Bennett*, 92 F.3d at 1349 (finding that rational, if imperfect, trial strategy is not ineffectiveness); *Bunch*, 949 F.2d at 1363 ("When examining ineffective assistance claims, however, we must appreciate the practical limitations and tactical decisions that trial counsel faced.")

1. Trial counsel were not ineffective because they advised petitioner not to testify.

It is difficult to imagine a decision more personal to, and more dependant upon, the relationship between an attorney and his or her client than the decision addressing whether his or her client should testify.

The affidavits in this case make clear that trial counsel were struggling with a difficult factual situation, knowing before trial that the Commonwealth had the benefit of the testimony of two co-defendants and that petitioner had an extraordinarily bad record which could be used against him in the guilt phase. The affidavits also reveal that the decision not to have petitioner testify was made at the last minute but specifically after consultation

between petitioner and lead trial counsel. The decision was collaborative rather than unilateral.

The decision not to have petitioner testify at trial represented an informed change of strategy in the midst of trial. Such a decision is "virtually unchallengeable" on appeal. *Turner v. Williams*, 35 F.3d 872, 904 (4th Cir. 1994) (quoting *Strickland*, 466 U.S. at 690). *See also Williams v. Kelly*, 816 F.2d 939, 947 (4th Cir. 1987) (advice to robbery defendant to testify found not to be ineffective assistance); *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991) (not ineffective assistance for trial counsel to neither recommend nor attempt to persuade defendant to accept a plea bargain); *Clozza v. Murray*, 913 F.2d 1092, 1100-01 (4th Cir. 1990) (not ineffective assistance of counsel to concede guilt).

2. Trial counsel was not ineffective for failing to confront the prosecution's argument that the gun was fired twice and in an upward position.

This is merely an extension of petitioner's argument that his trial counsel were ineffective for failing to have him testify. As appropriately noted by respondent, petitioner had already entered a plea of guilty to the robbery. Two eye-witnesses had already testified that petitioner had a gun; one of the eye-witnesses heard petitioner threaten the clerk, and the other saw petitioner squat down next to the clerk, place the gun to his head, and shoot him, after which he stood up laughing. Two of petitioner's co-defendants had already testified against him. Petitioner had a prior felony record, which had not

yet been brought out. There were numerous reasons why it might be appropriate for him not to take the witness stand. After consultation with his counsel, petitioner elected not [sic] take the witness stand.

Counsels' advice not to testify is a paradigm of the type of tactical decision that cannot be challenged as evidence of ineffective assistance. *Hutchens v. Garrison*, 724 F.2d 1425, 1436 (4th Cir. 1983)

3. Trial counsel did not fail to challenge the testimony of the Commonwealth's medical examiner, Dr. Francis Fields.

This claim has several components. First, habeas counsel object to the fact that Fields was not subjected to any questioning concerning her qualifications; second, the handling of her testimony is attacked on the grounds that she was not "qualified to testify as to projectile direction, trajectory or shooting reconstruction," (Pet. ¶ 165); third, there is an attack on trial counsel because Fields testified without objection from the defense that the bullet was fired in a forward, upward and rightward direction; and finally, trial counsel are criticized for venturing into the subject of powder burns around the wound. (Pet. ¶¶ 165-70.) All of the objections constitute the quintessential type of "Monday morning quarterbacking" which *Strickland* precludes.

Examination of the trial transcript reveals that Fields' testimony was limited to the scope of her professional knowledge, as a medical examiner. The fact that her

qualifications as a medical examiner were stipulated to is "virtually unchallengeable." *Turner; Strickland.*

Fields' testimony was identical to the facts set forth in the autopsy report, a copy of which was furnished to counsel well before trial. Her testimony of the path that the bullet took from the time that it entered the victim's body until the time that it exited the victim's body was based upon her first-hand knowledge, acquired in the course of performing the autopsy on the victim, and was clearly within her area of expertise and range of competence insofar as the opinion reflected in that testimony is concerned.

Fields answered only the questions which were addressed to her. She did not testify about the angle at which the gun was held, only the path the bullet took. Photographic exhibits confirmed her testimony. Any conclusions about petitioner's conduct were left to the jury.

Finally, defense counsel was entitled to explore the subject of powder burns. That the line of questioning was unhelpful does not mean that counsel was constitutionally ineffective.

The claim is without merit.

4. Trial counsel did not fail to adequately cross-examine the "firearms identification" expert.

The gravamen of this complaint is that trial counsel permitted Julian Mason to testify in areas beyond that of "firearms identification," the expertise ascribed to him in the claim. However, the claim misrepresents the record.

Trial counsel filed a motion to compel the state to identify any expert witnesses they intended to call. (Rec. at 0096.) At a hearing on January 8, 1993, the motion was specifically addressed. Trial counsel acknowledged that the medical expert would be Doctor Fields, and the autopsy report was a part of the record to which trial counsel had complete access. The Commonwealth stated "the only other expert, other than the medical examiner, that I am aware of that has done anything in connection with this case would be Julian Mason, the ballistics man from the Division of Forensic Science." (1/8/93 Tr. at 4.) The Commonwealth went on to say that the defense had had the ballistics report since November 28, 1992. The Commonwealth Attorney noted that the bullet which was recovered was so mangled, it could not be used to prove anything. However, he went on to represent to the defense the following:

> [A]nd the only other thing he would say is that this .38 caliber revolver is capable of firing 9 millimeter rounds.
>
> And it would cause the same kind of microscopic markings on the bullets as the bullet he found on the floor. But he can't say it came from that gun.
>
> The only reason he would testify is to testify that 9 millimeters will fire in a .38 caliber revolver.
>
> THE COURT: My question is, Mr. Arrif, does that answer your question?
>
> MR. ARRIF: Yes, it does. We'll withdraw that motion, Judge.

(1/8/93 Tr. at 5.)

The testimony of Mason at trial strictly followed the representations of the attorney for the Commonwealth.

The only testimony which went beyond that described by the Commonwealth during the motion hearing was the testimony of Mason that there was no evidence that the gun would "misfire," nor was there any evidence to suggest that the gun had a "hair trigger." Both of these subjects were properly raised on redirect examination, after the subject of the mechanical condition of the murder weapon was properly raised by trial counsel on cross-examination.

While the defense cross-examination of the expert may reflect the consequences of violating the old legal maxim, "if you don't know the answer, don't ask the question," there is not a single question propounded to the expert, whether on direct or cross, that was reasonably outside of the expected range of testimony of Mason, given his previous identification by the Commonwealth as a "ballistics expert." Further, his ability to identify the operating mechanism of a firearm is totally consistent with his identification as a "firearms identification" expert.

This claim is without merit.

5. Trial counsel were not ineffective for failing to seek outside assistance.

This claim is precisely what Judge Wilkinson referred to when he wrote "[i]t is becoming all too commonplace to charge even diligent counsel in the midst of difficult

circumstances with the adverse outcome in a capital case." *Bunch* at 1363.

The claim is presented through a number of different attacks on the efforts of trial counsel. There is criticism of the fact that trial counsel essentially conceded that petitioner fired the fatal shot; that trial counsel was at fault for failing to acquire a defense expert to testify "that the angle of the bullet was probably in either a downward . . . or sideways position," (Pet. ¶ 188), assuming such proposed testimony would have been permitted; that trial counsel was ineffective for objecting to Exhibit 14, a photograph showing where a bullet was recovered, (Pet. ¶ 190); the failure of counsel to object to the testimony of a police officer who identified the photograph and the bullet, and additionally, identified what was thought to have been a ricochet, (Pet. ¶ 194); and the failure to have a witness testify that certain clicking sounds heard by witnesses as petitioner exited the 7-11 came from the door opener, as opposed to the gun petitioner was holding, (Pet. ¶ 197).

It first need be said that counsel have offered nothing to establish that any of the theories which are discussed in the course of this objection are plausible, let alone capable of being supported by a credible witness. Second, the photograph to which counsel objected showed a bullet in the area of the vicinity where the decedent was shot. The basis for the objection was that the Commonwealth failed to lay a foundation to establish that that was the bullet that had killed the decedent and second, that counsel had not previously been shown the location where the bullet was recovered. Neither of the objections were valid. The police officer who photographed the

crime scene identified a photograph showing the bullet on the floor of the 7-11 and then identified the bullet. The second part of the objection was blunted by trial counsel's acknowledgment that he may have seen the bullet in another picture shown to him by the Commonwealth prior to trial. (1/27/93 Tr. at 66-70, 73.) Finally, the testimony of the police officer that he believed the bullet ricocheted off of the safe was admitted, without objection. Assuming, *arguendo*, that trial counsel should have objected to the testimony, the failure to do so was harmless. It could not possibly have damaged the defense's case, given the unrebutted testimony that petitioner fired the gun while squatting down beside the decedent next to the safe off which the bullet is alleged to have ricocheted. Any error which may have occurred fails to rise to a constitutional level.

Prior to *Strickland*, the Fourth Circuit recognized that the standard for attorney conduct "does not require that representation be flawless, only that all decisions materially affecting defendant's representation be the product of informed judgment, not neglect or ignorance." *Sallie v. North Carolina*, 587 F.2d 636, 640 (4th Cir. 1978).

The standard articulated in *Strickland* makes even clearer that the conduct of counsel must result in actual prejudice to a defendant before it rises to a constitutional level.

This claim does not rise to the *Strickland* standard.

c. Trial counsel was not ineffective for failing to object to co-defendant's testimony about his sentence for the murders.

This particular claim is not addressed in any of the affidavits of trial counsel. Thus, habeas counsel are left to speculate, in the form of a claim, about the failure to object.

It is easy to see from the presentation of petitioner's counsel, and the respondent's answer, that reasonable counsel could differ. Petitioner, by counsel, says that the presentation of a co-defendant's life sentence had the affect [sic] of leaving the jury "to impose a harsher sentence on Mr. Ramdass to reflect his comparative culpability rather than because the sentence was appropriate on its own." (Pet. ¶ 202.)

Respondent replies by citing *Coppola v. Commonwealth*, 257 S.E.2d 797 (Va. 1979), in which the defense sought to offer in evidence the fact that a co-defendant in a brutal killing had been convicted of capital murder and sentenced to life, but the evidence was excluded on the grounds that it did not constitute mitigation evidence under section 19.2-264.4 of the Virginia Code and that the trial court did not abuse its discretion in refusing it as irrelevant. *Copolla* at 804-05.

Singh participated in the planning and execution of the robbery resulting in Kayani's death. He was as culpable and susceptible to capital punishment as petitioner. It was not ineffective assistance to permit the jury to know that Singh would live. It was appropriate to make the jury aware that a co-defendant, testifying against petitioner, would live on.

It is precisely this kind of claim which gives rise to the admonition that reviewing courts must be "highly deferential" in scrutinizing trial counsel's tactics. *Strickland*, 466 U.S. at 689, applied in *Beavers v. Pruett*, No. 9704, 1997 WL 585739 (4th Cir., September 23, 1997); *Bennett v. Angelone*, 92 F.3d 1336, 1349 (4th Cir. 1996).

d. Miscellaneous claims of ineffectiveness.

1. Trial counsel did not conduct adequate voir dire (Claim 6(a)).

This claim incorporates several allegations, not all of which will be specifically addressed.

Habeas counsel addresses the makeup of the jury (all white), the background of the jury (several had read accounts in the media), and the experience of the jury (some members of the panel had been victims of violent crimes).

Counsel particularly objects to the retention of jurors Powell and Ross, who, in response to very confusing questions, appeared to have difficulty with the concept of considering various mitigating circumstances.

Counsel object to members of the panel who described the crime as "brutal" (Juror Owens, 5/18/93 Tr. at 47), "horrible" (Juror Peoples, 5/18/93 Tr. at 50), a juror who was a friend of a witness in the case, (*id.* at 43), two jurors whose children or in-laws were police officers in Fairfax County, (*id.* at 68-69), several jurors familiar with the crime scene, (*id.* at 45-47), and eight jurors that were victims of crimes, (*id.* at 83-88). Finally, counsel object to the retention on the panel of Juror Amelia

because she indicated she might have "reservations" if petitioner didn't testify. (*Id.* at 90.)

On direct appeal, trial counsel presented three issues: that the trial court erred in refusing to dismiss a juror personally acquainted with one of the witnesses and a second juror who had preconceived notions about the brutality of the crime (Assignment of Error 18), that the trial court erred in refusing to permit inquiry into whether jurors had the belief that petitioner would be executed if the death sentence was imposed (Assignment of Error 19), and that the trial court erred in denying the opportunity to *voir dire* the jury regarding specific mitigation circumstances (Assignment of Error 20). All of these claims were abandoned on appeal and treated by the court as waived. *Ramdass*, 246 Va. at 419. In the state habeas petition, only three claims were raised: trial counsel's failure to move to strike Amelia for cause, the failure of trial counsel to move for individual *voir dire*, and the failure to question the majority of the panel regarding consideration of mitigating factors and sentencing. All of these issues were rejected by the Supreme Court on the merits.

The only issues which survive for consideration are those pertaining to jurors Amelia, Ross, and Powell. The latter two jurors were the last jurors questioned about their willingness to consider mitigating factors.

The parties agreed "to have a panel of twenty-three [jurors] . . . and that we agree that both sides will have five preemptory challenges, which will then leave one juror as an alternate in case there is a need for it." (1/26/93 Tr. at 27.)

Examination of the transcript reveals that the questioning of Ross and Powell occupies twenty pages of record. In the course of the examination, it is clear that the defense counsel asked inarticulate questions on occasion which evoked responses from the witnesses indicating that certain elements of the case could not be considered by them in mitigation, although each of the jurors acknowledged that they could follow the instructions of the court if told to consider certain mitigating factors. At the conclusion of the examination, trial counsel objected to each of the jurors and moved to strike them for cause stating "[y]our honor they have demonstrated that they will not consider specific facts as mitigating factors." (5/18/93 Tr. at 278.) In fact, counsel emphasized that the responses to the questions by the jurors indicated that they could not consider things such as age in mitigation of the sentence, the matter about which counsel was most concerned.

As to Ross and Powell, there is no question that their presence on the jury was challenged, that the challenges were overruled, and that the decision of the trial court was within the sound discretion of the trial court to make. This element of the claim is without merit.

The claim with regard to juror Amelia has even less merit. In the course of general questions posed to the panel, Amelia said she thought she might have reservations if petitioner didn't testify. However, the transcript, thereafter, fails to reveal that Amelia was ever selected as a member of the trial panel.

The transcript for January 26, 1993, reveals that the trial panel consisted of jurors Matthys, Oglesby, Tkach,

Wood, May, Owens, Volpe, McClellan, Padberg, Schuessler, Young, Patterson, McMahon, McDaniel, Peoples, Shavlik, McEntire, Sillex, McNette, Noud, Moreau, Powell, and Ross. Amelia was not a part of the panel. (1/26/93 Tr. at 285-89.)

Powell, Moreau, Peoples, McMann, Patterson, Young, Owens, Wood, Oglesby, and Mathis were struck. Powell was the fifth preemptory strike by the defense. Ross was the alternate and was excused prior to the commencement of deliberations (1/28/93 Tr. at 63.)

Petitioner does not assert claims against any of the remaining members of the jury panel. Since all of the members of the panel to whom petitioner objected were removed from the panel, prior to deliberations, no claim based on a lack of jury impartiality can survive. *Ross v. Oklahoma*, 487 U.S. 81, 85-86 (1987). All of the remaining jurors were constitutionally impaneled, and this claim is without merit.

2. Counsel was not ineffective for conceding the nature of petitioner's background (Claim 6(b)).

This claim hinges upon counsel's statement that "Bobby Lee Ramdass was a bad boy. He's a bad man. He's committed crimes of violence in the past. He won't stand up here and tell you that he won't commit crimes of violence in the future," made in the defense opening statement during the sentencing phase. (Pet. ¶ 233; 1/29/93 Tr. at 98.)

The next paragraph of the petition effectively acknowledges that the statement was a reflection of trial strategy: "counsel may have hoped in this way to establish credibility for their mitigation theory. . . . " (Pet. ¶ 234.) *Strickland* precludes us from second-guessing.

Further, statements which may appear to concede an element of the prosecution's case, or present a defendant in a bad light, are consistent with trial strategy of seeking to maintain credibility with the jury and do not constitute ineffective assistance of counsel. *Clozza v. Murray*, 913 F.2d 1092, 1098 (4th Cir. 1990); *Bell v. Evatt*, 72 F.3d 421 (4th Cir. 1995); *Brown v. Dixon*, 891 F.2d 490, 500 n.20 (4th Cir. 1989).

As the court noted in *Bell*, "unsuccessful trial tactics neither constitute prejudice nor definitively prove ineffective assistance of counsel." *Id.* at 429.

3. Trial counsel were not ineffective in their preparation for the sentencing phase of trial (Claim 6(c)).

Habeas counsel make two arguments, into which they attempt to blend the procedurally defaulted claims concerning Dr. Samenow, the mental health expert appointed by the court.

Because the issue of Dr. Samenow is procedurally defaulted, his assistance, or lack thereof, will not be further addressed.

Counsel claim that the jury was denied mental health information prepared in the course of prior evaluations as reflected in petitioner's juvenile files and that the

evaluations would provide strong mitigating evidence. (Pet. ¶ 239.) The petition states that the defense attempted to present the information through the hearsay testimony of a probation officer, which was objected to by the prosecution and barred by the court. *Id.* That is not a correct statement.

The prosecution objected to certain testimony offered by the defense through Jennifer Joffe, a probation and parole officer for the Commonwealth of Virginia who had conducted a presence investigation on petitioner four years earlier. (1/29/93 Tr. at 115.) Joffe was asked about petitioner's mother, and more particularly about Mrs. Ramdass's physical health history. The Commonwealth objected. After some discussion, and a determination that Mrs. Ramdass would testify, the Commonwealth's objection was sustained. (*Id.* at 120-21.) However, Joffe was permitted to testify, and did testify about petitioner's counseling. The record reveals that she testified petitioner was in counseling and psychotherapy from August through September, 1986, and October through November, 1986, and for a short time when he was on parole, and that therapy was terminated "because he saw no reason to be in therapy. Another time, it was terminated because he was recommitted to the state department of correct[io]ns." (1/29/93 Tr. at 123.) The real problem for petitioner came on cross-examination when the witness was asked whether the reports indicated that petitioner was psychotic or suffering from severe mental problems. The answer to each question was no. (1/29/93 Tr. at 126-27.)

Habeas counsel also argue that the mitigation phase was constitutionally handicapped by the nonappearance

of a guidance counselor. Apparently, trial counsel thought that the witness had been recognized, but she had not. Upon discovering that fact, trial counsel notified the court, and the record contains a proffer of her expected testimony:

> Your Honor, Ms. Mayo, her full name is June Mayo, is a seventh grade teacher at the Carl Sandberg Middle School in Alexandria, Virginia. She was Bobby's seventh grade teacher. She's one of the few people that Bobby would actually talk to.
>
> He would tell her about his life and such. She told me he did fairly well in her classes, not anywhere else and that she liked him and that she was aware that he did have problems elsewhere in school and with his family.
>
> That's pretty much it.

(1/29/93 Tr. at 242.)

That proffer was permitted to go to the jury without objection by the Commonwealth. Thus, the essence of the testimony that Mayo would have offered was not lost to petitioner but made known to the jury in the form of a proffer.

Finally, in addition to Joffe, trial counsel called to the witness stand the petitioner, his brother, and his mother. As a prelude to his mitigation case, trial counsel made an extensive opening statement and informed the jury of the myriad problems experienced by petitioner, describing his family as "unbelievably dysfunctional" and referring to petitioner as one of "Fagan's children from Dicken's [sic] London." (1/29/93 Tr. at 91) He described petitioner's lack of school experience; his experimentation

with PCP, cocaine, marijuana, and alcohol; his prior incarcerations for serious offenses; his pending charges in other jurisdictions; his minimal contact with his father; his residence in a storage shed of a condominium for a while; his abject poverty; his lack of any serious parenting; and his total absence of any employment history.

Reasonable attorneys might have argued about how to present this background, but it is unlikely that there was much additional material which could have been offered in mitigation given the facts which the jury heard in the guilt phase and the criminal history which the jury heard in the sentencing phase. The decisions made by his counsel in presenting the sentencing portion of his case reflect the kind of judgment which must be made in the context of the entire case. There is no evidence to suggest any additional witnesses, assuming they could be found, would have produced a different result, nor is there even an inference to be drawn that petitioner suffered actual prejudice. Counsel's performance was not constitutionally defective. *Beavers v. Pruett*, 1997 WL 585739 *4 (4th Cir. September 23, 1997); *Beaver v. Thompson*, 93 F.3d 1186, 1195 (4th Cir. 1996).

Finally, it is clear that in his entire juvenile and short adult history, there is not a scintilla of evidence to suggest that petitioner suffered from any mental disease or defect which would render him unaccountable for his behavior.

All of the admonitions emanating from *Strickland* apply with particular force to this claim. It is without merit.

3. Petitioner was not entitled to a medical doctor and an investigator (Claim 7).

On December 4, 1992, trial counsel filed three motions: (1) a motion for the appointment of additional counsel; (2) a motion for an expert investigator; and (3) a motion for a physical examination ("to include eye tests, hearing tests, and a . . . physical examination to determine . . . whether or not the defendant suffers from diabetes, arterioscleroses, or other physical disability.")

None of the motions was accompanied by a memorandum in support thereof nor did any of the motions articulate specific facts which would justify the granting of the motions.

On December 8, 1992, the matters came on for hearing before the court. In addressing the motion for a complete physical examination, counsel, after first noting his objection that he was unable to proceed *ex parte*, explained that he wanted a complete physical because his client "does have sight and hearing defects, and I have information that leads me to believe that he may suffer from some type of reflexive disorder." (12/8/92 Tr. at 5.)

The Commonwealth pointed out that petitioner had probably had numerous physicals and that there may have been medical records in the institutions which the defense could examine. (*Id.* at 6.) The court, in response, noted the lack of information that had been furnished to the court to justify such an examination and denied the motion. (*Id.* at 6-7.) At this point, counsel for petitioner asserted his theory that petitioner fired the gun as a reflexive action, after hearing the first shot fired by Wilson. Trial counsel went on to state "I also believe that

Mr. Ramdass is suffering from what is called muscle-boundness, that a twist of the body can require a reflexive action in the hand." (*Id.* at 8.) The court asked counsel, "[d]o you have any medical evidence to support your belief," to which counsel replied "[a]t this time I do not, your Honor, because I have not been given any physical records." (*Id.* at 8.) The motion was denied. (*Id.* at 9.)

The court then went on to address the request for an expert investigator. Trial counsel acknowledged that he had no absolute right to his request, but relied upon *Ake v. Oklahoma*, 470 U.S. 68 (1985) (finding entitlement to assistance of mental health expert when sanity is significant trial factor or issue of future dangerousness is used by prosecution) and *Ross v. Moffitt*, 417 U.S. 600 (1974) (petitioner entitled to the assistance of counsel to pursue appeal as a matter of right). (5/18/93 Tr. at 14-15.)

In response, counsel for the Commonwealth opposed the appointment, citing in support of his opposition *Gray v. Commonwealth*, 356 S.E.2d 157, 166 (Va. 1987); *Watkins v. Commonwealth*, 331 S.E.2d 422 (Va. 1985); *Stockton v. Commonwealth*, 314 S.E.2d 371 (Va. 1984); *Quintana v. Commonwealth*, 295 S.E.2d 643 (Va. 1982); and *Yeatts v. Commonwealth*, 410 S.E.2d 254, 258 (Va. 1991), all cases in which the appointment of an investigator was denied. (5/18/93 Tr. at 19-20). The court denied petitioner's motion for the appointment of an expert investigator but specifically granted the motion to appoint additional counsel to assist in the defense of the matter. (*Id.* at 22.)

The claim in its entirety is without merit.

Taking the matters in reverse order, while the request for an expert investigator, unsupported by all but the most perfunctory of reasons, was denied, the defense team was given additional relief, at public expense, in the form of an attorney. If the purpose of the investigator was to gather documents, interview witnesses, and help prepare the case, both in response to the charge and in mitigation, the appointment of a third attorney in the case goes a long way toward satisfying the minimally articulated need for an expert investigator.

Further, denial of a private investigator has been upheld when a defendant requesting such assistance "has offered nothing more than a bare assertion that private assistance would have been beneficial to him, which does not state a violation of due process." *Gray v. Thompson*, 58 F.3d 59, 77 (4th Cir. 1995) (citing *Caldwell v. Mississippi*, 472 U.S. 320, 323-24 n.1 (1985)).

The request for a physical examination was, likewise, correctly refused. Petitioner relies almost exclusively on *Ake v. Oklahoma*, 470 U.S. 68 (1985), which stands for the proposition that when an indigent defendant credibly raises the issue of his sanity at the time of the commission of the offenses with which he is charged, he must be accorded the opportunity to pursue that defense by the appointment, at state expense, of a mental health expert who can provide the requisite assistance. While *Ake* is couched in language addressing an insanity defense, the principle that it articulates – that when a defendant raises a genuine need for expert assistance in order to be able to defend himself against criminal charges, assistance is mandated – is a constitutionally sound principle, premised on demonstrated need. It does not constitute a license for a "fishing expedition," and defense counsel is

not entitled to medically troll, in hope of snagging a medical excuse.

In *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980), the Fourth Circuit granted the habeas petition of a defendant who sought the assistance of a forensic pathologist in a murder case based upon the defendant's contention that the death of the decedent, which occurred eight months after he was shot, was not proximately caused by the defendant. In order to establish his claim, it was essential that he have expert assistance, but his indigency precluded him from acquiring such expertise. Judge Butzner stated:

> Because a substantial question requiring expert testimony arose over the *cause* of Maybank's death and because Williams' defense *could not be fully developed without professional assistance that would have been available to a person who could afford his own defense*, Williams has satisfied the dual test prescribed . . . to establish that he was denied equal protection of the law. Further, the trial judge's refusal to provide an expert deprived Williams of the effective assistance of counsel and due process of law in violation of the sixth and fourteenth amendments.

Id. at 1027 (citations omitted) (emphasis added).

That case further stands for the proposition that the determination of an indigent defendant's need for expert assistance is committed to the sound discretion of the trial judge. *Id.* at 1026. *See also United States v. Borne*, No. 90-5522, 1991 WL 209832 (4th Cir., October 21, 1991); *United States v. Briley*, No. 86-5619, 1987 WL 37034 (4th Cir., April 7, 1987).

The matter was discussed in *Terry v. Rees*, 985 F.2d 283 (6th Cir. 1993), in which a defendant sought a pathologist to independently determine the cause of death. The court concluded that the defendant received a fundamentally fair trial. *Id.* at 284. However, in the course of the opinion they discussed the *Williams* case, concluding "[w]e find *Williams* persuasive and endorse its procedure for resolving this issue in this Circuit." *Id.* at 285.

Williams remains good law in the Fourth Circuit.

Following *Ake*, the Supreme Court addressed the issue of appointment of counsel on appeal and concluded that the due process clause of the Fourteenth Amendment does not require a state to provide respondent with counsel in a discretionary appeal to the state supreme court. The court noted:

> An indigent defendant seeking review in the Supreme Court of North Carolina is . . . somewhat handicapped in comparison with a wealthy defendant who has counsel assisting him in every conceivable manner at every stage in the proceeding. . . . And the fact that a particular service might be of benefit to an indigent defendant does not mean that the service is constitutionally required. The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process.

Ross v. Moffitt, 417 U.S. 600, 616 (1974).

Finally, in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), an incidental issue raised by petitioner's challenge to his conviction for murder pursuant to the Mississippi capital punishment statute was the trial court's refusal to appoint various experts and investigators to assist him, specifically a criminal investigator, a fingerprint expert, and a ballistics expert. The Supreme Court, in a footnote, stated:

> The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than 'the general statement that the requested expert "would be of great necessarius witness." ' 443 So.2d 806, 812 (1983). Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process in the trial judge's decision. . . . We therefore have no need to determine as a matter of federal constitutional law what if any showing would have entitled a defendant to assistance of the type here sought.

Caldwell, 472 U.S. at 323, n1.

4. Petitioner was not unreasonably denied the opportunity to proceed in camera in pursuit of his experts (Claim 8).

Petitioner, by counsel, asserts a constitutionally mandated entitlement to *ex parte* hearings on his request for the appointment of experts, in this particular case, a medical doctor and an investigator.

Petitioner cites no cases which establish the constitutional entitlement he seeks to impose.

Virginia law has been consistently applied. The Virginia Supreme Court, in deciding this case, relied upon its previous ruling in *O'Dell v. Commonwealth*, 364 S.E.2d 49 (Va. 1988), and applied the ruling in *Ramdass*, 437 S.E.2d at 569, and later in *Weeks v. Commonwealth*, 460 S.E.2d 379 (Va. 1994).

Further, a decision establishing such a constitutional right and applying it to petitioner's case would constitute the establishment of a new rule, since the constitutional protection petitioner seeks was not in place at the time petitioner was tried. Habeas relief is appropriate only if a state court considering the claim would have felt compelled by existing precedent to apply the rule sought. *Saffle v. Parks*, 494 U.S. 484, 488 (1990), applied in *Gray v. Netherland*, 116 S.Ct. 2074, 2083 (1996). Further, in order for a new rule to be applied retroactively, the rule must fall within one or two exceptions provided in *Teague v. Lane*, 489 U.S. 288 (1989): First, a new rule may be applied retroactively if the rule "places a class of private conduct beyond the power of the State to proscribe." *Saffle* at 494 (citing *Teague*, at 311.) That is not the case before the Court.

Second, a new rule may be applied "for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceedings." *Parks v. Saffle* at 495 (citing *Teague* at 311.) *See Gray*, 116 S.Ct. at 2084-85.

If entitlement to an *ex parte* hearing on a request for expert assistance for an indigent defendant is constitutionally mandated, and it constitutes a "watershed rule of criminal procedure," such a declaration will have to be made by the Court of Appeals or the Supreme Court. The claim is without merit.

5. Petitioner was not unconstitutionally denied exculpatory material by the prosecution (Claim 9).

This claim has two components. The first is the denial of polygraph results which trial counsel sought to use for impeachment purposes. The second component consists of statements made by petitioner's co-defendants and other prospective witnesses, to the police, including inculpatory and inconsistent statements made by co-defendants.

There is no general constitutional right to discovery in a criminal case in Virginia. *Lowe v. Commonwealth*, 239 S.E.2d 112 (Va. 1977). *Strickler v. Commonwealth*, 404 S.E.2d 227 (Va. 1991); *Ramdass v. Commonwealth*, 437 S.E.2d 566 (Va. 1993). Rule 3A:11, Rules of the Supreme Court of Virginia addresses and provides for limited discovery in criminal cases, setting forth a specific category of materials to which a defendant is entitled. Beyond the entitlement created by the rules, a defendant has no rights.

Examination of the record in this case, including the motions filed by petitioner and the transcripts of the motion hearings prior to trial, reveal that extensive discovery was furnished to petitioner and that the Commonwealth was scrupulous in according to petitioner access

to all matters bearing directly on his guilt or innocence prior to trial. This Court has no question that the requirements of *Brady v. Maryland*, 373 U.S. 83 (1963) were appropriately honored.

Addressing the specific matters before the Court, petitioner concedes that he was not entitled to the results of the polygraph examinations of the co-defendants. (Reply Pet. at 83.) First, such material is inadmissible under Virginia law, *Robinson v. Commonwealth*, 341 S.E.2d 159, 167 (1986). Second, failure to disclose polygraph results does not deprive a defendant of "material" evidence under the *Brady* rule when the polygraphs results are inadmissible, even for impeachment purposes, as in the Commonwealth of Virginia. *Wood v. Bartholomew*, 516 U.S. 1 (1995).

Petitioner's remaining claims are likewise without merit. First, all of petitioner's co-defendants in the offenses for which he was tried, and in offenses occurring in other jurisdictions, were known to or available to counsel for the defense, and the witnesses could have been called on petitioner's behalf, had counsel so desired. Second, in order for a *Brady* violation to occur, the material sought must be "material." Evidence is "material" under *Brady* "only where there exists a 'reasonable probability' " that had the evidence been disclosed the result at trial would have been different. *Wood* at 5. A "reasonable probability" that the result would have been different is shown when the actions of the government "undermine[ ] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995), quoting *United States v. Bagley*, 473 U.S. 667, 678 (1985).

Further, *Brady* requires only that the government disclose evidence not available to the defense from other sources either directly or through diligent investigation. *Barnes v. Thompson*, 58 F.3d 971, 975 (4th Cir. 1995); *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir. 1990).

Counsel has not asserted either that material was withheld from them that they had no other means of obtaining or that material was withheld from them that would undermine the confidence in the outcome of this trial.

There is no evidence in the record that a *Brady* violation occurred. At least one victim and two co-defendants testified against petitioner; his identity as the person who committed the robbery, held the gun, and shot Kayani was established beyond a reasonable doubt. Assuming, *arguendo*, that the purported *Brady* material sought, not counting the polygraph material, was exculpatory in nature, petitioner has made no "showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles*, 514 U.S. at 435.

Finally, the trial court did not commit error by refusing to examine the prosecution's file *in camera* to determine the presence of exculpatory material. In addressing the issue, the Virginia Supreme Court said

> In order to establish that the Commonwealth has violated a defendant's *Brady* rights, the record must indicate that the undisclosed evidence was in fact exculpatory and material either to guilt or to punishment. . . . Nothing in this record indicates either that the Commonwealth's Attorney has withheld exculpatory information or that the answers given by Ramdass's accomplices in their polygraph tests would be favorable to him and material to his guilt or punishment.

Ramdass, 437 S.E.2d at 570.

In *Rowe v. Grizzard*, 591 F. Supp. 389 (E.D. Va. 1984), defense counsel asked for co-defendants' and witness's statements "which contradicted others' statements and/or were internally inconsistent." *Id.* at 398: The court refused, noting the prosecution's burden to comply with *Brady*. The district court affirmed, noting "[a]bsent a more specific request than was made, the trial court is not required to make an *in camera* inspection of the prosecution's entire file." *Id.*

6. Petitioner's claim that the statutory review of his death penalty is insufficient is both procedurally barred and unsupported by the record (Claim 13).

Respondent argues that this claim is procedurally barred under *Slayton*, and the Court agrees.

Petitioner argues that the proportionality review required by section 17-110.1(C)(2) of the Virginia Code is insufficient for a variety of reasons, the most significant of which addresses the alleged insufficiency of the comparisons made by the Supreme Court in assessing whether the penalty imposed upon petitioner is consistent with cases bearing similar facts. There is very little legal authority cited for the position taken by petitioner,

and much of the argument is unsupported. However, in addition to attacking the character of the review conducted by the Supreme Court, petitioner also asserts,

> The state court had a duty under Virginia Code section 17-110.1(C) to scrutinize the entire trial record for the influence of passion, prejudice, or any other arbitrary factor, in addition to allegations of prejudice raised by counsel. In spite of this mandate, the state court ignored ample evidence of passion, prejudice, and arbitrariness in the verdict. Despite the numerous examples of passion, prejudice, and arbitrariness noted throughout this petition, all of which is incorporated herein by reference, the Virginia Supreme Court failed to perform any meaningful review of the record for such conduct.

(Pet. ¶ 349.)

Section 17-110.1(c)(2) mandates that the Supreme Court consider and determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Va. Code Ann. ¶ 17-110.1(c)(2) (Michie 1996).

There are, however, no examples of "passion, prejudice, and arbitrariness" cited in support of the argument nor any suggestion of excessiveness when compared to their cases.

On January 30, 1993, following receipt of the verdict, trial counsel made no motion to set aside the verdict as a product of passion, prejudice, or arbitrariness.

On March 2, 1993, when trial counsel appeared and moved for a continuance of the hearing procedure because petitioner had not yet received all of the records to which he was entitled from the state institutions, no such motion was made.

On April 2, 1993, when petitioner and his trial counsel appeared for sentencing, trial counsel devoted much of the hearing to the constitutionality of electrocution, and more specifically, the means by which electrocution in Virginia is carried out, arguing that both the act, and the means implemented in Virginia, were unconstitutional in violation of the Eighth and Fourteenth Amendments. However, there was no mention of counsel's concern that the verdict was a reflection of passion, prejudice, or arbitrariness.

In the errors assigned on direct appeal, the matter was never raised, a fact noted by the Supreme Court. *Ramdass*, 437 S.E.2d at 573.

In the state habeas corpus petition, as in this federal habeas petition, the issue of the sufficiency of the proportionality review was raised only in the context of the nature of the comparisons engaged in by the Virginia Supreme Court and not in the context of a verdict which was the product of passion, prejudice, or arbitrariness at any time during the trial.

Finally, this Court has read all of the trial transcripts and all of the court documents that were filed by trial counsel, reviewed all of the exhibits admitted into evidence, and read all of the reports filed by experts and relied upon in the course of trial.

If ever a capital murder case was conducted by a judge sensitive to the emotional nature of such a proceeding, this is the trial. The proceeding was clean, to the point of being almost antiseptic. Arguments by the prosecution and the defense were devoid of the kind of emotional appeals that are frequently presented in conscious efforts to inflame a jury's passions to return a particular verdict.

Instead, the proceeding was objective. The Supreme Court of Virginia addressed the nature of the review it conducted, reciting petitioner's criminal history. It stated, "we have examined the records in all capital murder cases accumulated by this Court . . . paying particular attention to those cases in which the underlying felony was robbery and the death penalty was based solely on 'future dangerousness.' *Ramdass*, 437 S.E.2d at 573. Their conclusion, following a detailed review of petitioner's criminal history, was that the sentence was neither excessive nor disproportionate. *See Peterson v. Murray*, 904 F.2d 882, 887 (4th Cir. 1990).

Although the Virginia capital sentencing statute requires a proportionality review, the federal constitution does not. *Buchanan v. Angelone*, 103 F.3d 344, 351 (4th Cir. 1996), citing *Pulley v. Harris*, 465 U.S. 37, 50-51 (1984).

In *Buchanan*, the court went on to say "[t]he Virginia Supreme Court conducted the mandatory statutory review in this case. . . . On collateral review, federal courts are not required to re-examine a state court's good faith findings." *Id.*

When considered in the context of *Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996), a capital murder

case marked by the highly inflammatory argument of the prosecuting attorney, relying upon biblical references to behavior and alluding to unrelated grisly murders, the case before the Court is exceedingly clean and supports the finding of the Virginia Supreme Court that the "record discloses nothing to suggest that Ramdass's death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor." *Ramdass*, 437 S.E.2d at 427.

7. The Virginia death penalty statutes, neither on their face nor as applied, violate the Sixth, Eighth, and Fourteenth Amendments, and the Virginia capital murder sentencing statute is constitutional (Claims 10, 14).

Both of these claims focus on the same issue and are addressed jointly herein.

The claims fall generally into broad categories.

Petitioner alleges:

a. A jury is given little guidance and not told what they must find nor are they given any instruction on how to consider the mitigating evidence. (¶¶ 303, 304, 305; see also ¶¶ 351, 352, 353, 356-58, 360-62, 364.)

b. The aggravating factor of "future dangerousness" is unconstitutionally vague, and the penalty is imposed in an unconstitutional manner. (¶¶ 306, 308, 353, 354, 356-358.)

c. Imposition of the death penalty is unconstitutional "because it allows but does not

require that the sentencing court set aside a death sentence upon a showing of good cause and permits the court to consider hearsay in the post-sentence report." (¶¶ 309 and 355 essentially sets forth the same claim.)

d. The sentencing jury is permitted to consider petitioner's unadjudicated criminal behavior. (This ground is discussed separately hereinafter.)

e. The jury was improperly instructed by the court, at one stage, when the trial judge advised them that they must find beyond a reasonable doubt the "possibility" that petitioner would pose a danger to the public, as opposed to the "probability." (¶¶ 366-69.)

We begin with the proposition that "the punishment of death does not invariably violate the Constitution." *Gregg v. Georgia*, 428 U.S. 153, 169 (1976). In that case, Justice Stewart said "[f]or nearly two centuries, this Court, repeatedly and often expressly, has recognized that capital punishment is not invalid *per se*." *Id.* at 177-78. He went on to note that retribution and the possibility of deterrence are not impermissible considerations for a legislature, *id.* at 183, 185, and then addressed the real concern reflected in the decision of *Furman v. Georgia*, 408 U.S. 238 (1972), holding the then-existing Georgia death penalty statute unconstitutional:

> [T]he concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and

> guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Gregg at 195.

The Court went on to approve a Georgia capital sentencing procedure which included, among other things, a narrowing of the class of murderers subject to capital punishment; specification of certain aggravating circumstances, at least one of which must be found by the jury to exist before a death sentence can be imposed; authorization for a jury to consider any other "appropriate aggravating or mitigating circumstances," *id.* at 197; a statutory provision that the jury "is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court," *id.*; an automatic appeal of a death sentence, *id.* at 198; and mandatory proportional review, *id.* In short, the Supreme Court approved in *Gregg* the kind of proceeding reflected in the Virginia statute.

On the same day *Gregg* was announced, the Court handed down its decision in *Jurek v. Texas*, 428 U.S. 262 (1976), a Texas death penalty case in which the Texas statute required that a jury find either that the conduct of the defendant causing the death was committed deliberately and with reasonable expectation that the death would result; or that it was probable that the defendant would commit criminal acts of violence constituting a continuing threat to society; or, if raised by the evidence, that defendant's conduct was an unreasonable response

to the provocation, if any, by the deceased, as a condition for imposing the death penalty.

Of particular interest, in the context of this case, is the second aggravating factor: whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society. *Jurek* at 269.

The Virginia statute essentially parallels the Texas statute:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offenses of which he is accused *that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . .*

Va. Code Ann. § 19.2-264.4(C) (Michie 1995) (emphasis added).

In addressing the attacks on that aggravating element, the Supreme Court discussed the issue of "vagueness":

> Focusing on the second statutory question that Texas requires a jury to answer in considering whether to impose a death sentence, the petitioner argues that it is impossible to predict future behavior and that the question is so vague as to be meaningless. It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does

> not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. The decision whether to admit a defendant to bail, for instance, must often turn on a judge's prediction of the defendant's future conduct. And any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose. For those sentenced to prison, these same predictions must be made by parole authorities. The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

Id. at 274-76.

The concern that a lay jury might not understand the term "future dangerousness" was addressed in a concurring opinion by Justice Blackman who said "I agree with Justices Stewart, Powell, and Stevens that the issues posed in the sentencing proceeding have a common-sense core meaning and that criminal juries should be capable of understanding them." *Id.* at 279.

Jurek was applied to the Virginia statute in *Peterson v. Murray*, 904 F.2d 882, 885 (4th Cir. 1990), and the statute was found to pass constitutional muster. *Briley v. Bass*, 750 F.2d 1238, 1245 (4th Cir. 1984).

Since *Peterson* and *Jurek*, the Supreme Court has handed down the decision in *Tuilaepa v. California*, 512 U.S. 967 (1994), and cautioned reviewing courts that

> Because "the proper degree of definition" of eligibility and selection factors often "is not susceptible of mathematical precision," our vagueness review is quite deferential. . . . Relying on the basic principle that a factor is not unconstitutional if it has some "common-sense core of meaning . . . that criminal juries should be capable of understanding," . . . we have found only a few factors vague. . . .

Id. at 973-74 (citations omitted).

One of them is not "future dangerousness" as applied in Virginia.

An essential element in the issue of future dangerousness is the ability of the jury to consider not only aggravating, but mitigating factors. In section 19.2-264.4(B) of the Virginia Code, the Virginia statute specifically permits the jury to consider everything that might be a factor in mitigation, and the specific instruction given to the jury in this case told the jury that mitigating evidence was "evidence which may serve for a sentence less than death," and "may include . . . *any* facts relating to the Defendant's age, character, education, environment, mental condition, life and background, or any aspect of the crime itself, which might be considered extenuating or tend to reduce his moral culpability, or make him less deserving of the extreme punishment of death." (1/29/93 Tr. at 254.) The jury was then told, "[y]ou are permitted to fix the punishment of the Defendant at life . . . even if you find unanimously and beyond

a reasonable doubt . . . a probability that the Defendant would commit criminal acts of violence. . . . " *Id.*

Since *Jurek* and *Peterson*, the Virginia statute has been upheld in *Beaver v. Thompson*, 93 F.3d 1186, 1191 (4th Cir. 1996); *Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir. 1995); *Tuggle v. Thompson*, 57 F.3d 1356, 1362-63 (4th Cir. 1995); and *Spencer v. Murray*, 5 F.3d 758, 764 (4th Cir. 1993).

The standard was correctly explained, is not vague, and is susceptible of a "common sense" interpretation.

So long as the jury is permitted to consider any mitigating evidence, the instructions to the jury, and the resulting verdict, pass constitutional muster. *Buchanan v. Angelone*, No. 96-8400 (U.S. January 21, 1998).

Petitioner also claims that the statute is unconstitutional because it permits a sentencing court to set aside a death sentence upon a showing of good cause and permits the court to consider hearsay in the post-sentence report. Apparently, the complaint is that at some point in time, and on a basis for which there is no articulated standard, petitioner may receive the benefit of mercy.

A similar claim was addressed in *Gregg* where the Court noted

> [T]he petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant of a lesser included offense rather than find him

> guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the state and the Georgia Board of Pardons and Paroles.

Gregg at 199.

All of those conditions, and more, apply to petitioner. The Commonwealth did not have to prosecute this case as a capital case; the prosecutor could have offered petitioner a plea bargain, giving up his right to pursue a capital punishment in return for a plea of guilty; the jury could have imposed a life sentence, as opposed to the death penalty, without ever articulating its reasons; the trial judge, upon receipt of the presentence report, and for "good cause" could have set aside the sentence of death and imposed a sentence of imprisonment for life (section 19.2-264.5 of the Virginia Code); and petitioner may at an unforeseen time in the future, receive clemency in the form of a commuted sentence. However, as the Court went on to note, "[n]othing in any of our cases suggest that the decision to afford an individual defendant mercy violates the Constitution." *Id.* at 199.

The claim regarding consideration of hearsay, as it may be incorporated in a presentence report, borders on the frivolous.

First, there is no constitutional entitlement to a trial free from hearsay evidence. There are specific exceptions recognized in the rules of evidence and certain circumstances where hearsay is deemed appropriate (e.g. section

19.2-299(c) of the Virginia Code). It is mandated by section 19.2-264.5 of the Virginia Code and "shall . . . contain a Victim Impact statement."

Second, by law, the defendant must be informed of all facts and information contained in the report by being furnished a copy thereof. Thus, the defendant is afforded the opportunity to correct and/or rebut erroneous information.

Petitioner is not entitled to relief for this claim which arises out of the Virginia sentencing procedure.

Finally, there is one extraordinarily peculiar claim set forth by petitioner in the course of attacking the Virginia capital murder statute. Paragraph 365 of the petition states, "[a]lthough the Virginia capital sentencing statute contemplates consideration of mitigating circumstances, the emphasis on speculation as to the future dangerousness of the defendant inhibits rational and deliberate consideration of evidence in mitigation and does not adequately allow the jury to dispense mercy."

It is difficult to fathom the basis of the argument in the face of the trial court's instruction to the jury in clear, nontechnical language that even if they unanimously found petitioner to be a future danger that they may impose a life sentence as opposed to the death penalty. (Rec. at 161, Instr. A(S).) The Court can only conclude that the assertion is the result of the emotion engendered in these cases and not the product of a bona fide concern that a Virginia jury is not free to vote for life as opposed to death.

8. Petitioner was not denied the right of confrontation (Claim 11).

Petitioner claims that he was denied the right of confrontation in the course of cross-examination of Ramirez and Singh, each of whom was a co-defendant and participant in the event which is the subject of this petition because the trial court sustained prosecution objections to certain defense questions.

First, the fact that the co-defendants testified and that petitioner had the opportunity to hear their testimony on direct examination, and to cross-examine the witnesses following their direct testimony, absolutely rebuts his claim that he was not entitled to confront his accusers.

Second, any decisions which were made with regard to the scope of permitted cross-examination constitute evidential rulings, not constitutional rulings arising under the Sixth Amendment to the United States Constitution. No litigant, including a death penalty defendant, has the unlimited right to conduct an examination of any witness called to the stand. Rules of evidence govern all of the participants in a trial and apply with equal vigor in criminal cases.

The judgment of the trial court in denying certain questions was clearly within the province of the trial court and was upheld on appeal by the Virginia Supreme Court. Under the doctrine in *Sumner v. Mata*, 455 U.S. 591 (1982), this Court is bound to give weight and credence to the decision of the state courts applying Virginia substantive law to the presentation of evidence in the course of a trial.

As the court noted in *Estelle v. McGuire*, 502 U.S. 62 (1991), a federal court's habeas review is not intended to address issues of state criminal procedure and evidence. Quoting *Spencer v. Texas*, 385 U.S. 554, 563-64 (1967), the court in *Estelle* said "it has never been thought that such cases establish this court as a rulingmaking organ for the promulgation of state rules of criminal procedure." *Id.* at 70. *See also Spencer v. Murray*, 5 F.2d 758, 762 (4th Cir. 1993) applying *Estelle*.

9. The use of unadjudicated criminal misconduct in the sentencing phase is constitutionally permitted (Claim 12).

Petitioner complains about the admission of unadjudicated criminal conduct in the penalty phase of the trial. Specifically, petitioner was confronted with testimony in the sentencing phase of two victims of robberies that had not yet been tried. Christopher Cissel, a clerk at Bragg Towers, an apartment hotel, described petitioner robbing him at gunpoint, striking him with a fist, and knocking him to the floor with the butt of the pistol. (1/29/93 Tr. at 37, 39-40.) Emmanuel Selassie, a cab driver, described being robbed and shot at point blank range. (1/29/93 Tr. at 70-76.) Singh identified petitioner as the assailant. (1/29/93 Tr. at 62.)

Such evidence is expressly permitted under the sentencing statute. Va. Code Ann. § 19.2-264.3:2. The statute requires that a defendant be given notice, in writing, of the conduct upon which the Commonwealth intends to rely. Such notice was given in this case in letter form to trial counsel on January 26, 1993. There were no events of

which trial counsel was notified that were new or surprising to trial counsel, consisting, instead, of all of the previous conduct in which petitioner had engaged and about which counsel was thoroughly informed. There was, therefore, no element of surprise.

The procedure has been specifically approved in Virginia. In *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995), the Fourth Circuit said:

> We next turn to the question of future dangerousness. Virginia also permits the death penalty if the jury "find[s] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society." . . . In considering the defendant's potential violence, the Virginia jury has never been restricted to proof of adjudicated criminal convictions. To the contrary, the Commonwealth may introduce evidence of criminal misconduct for which the defendant has been neither tried nor convicted. . . . This rule of latitude – which also allows the defendant to present a wide range of mitigating evidence – was fashioned pursuant to the Supreme Court's instruction that "it [is] desirable for the jury to have as much information before it as possible when it makes the sentencing decision." (Quoting from *Gregg v. Georgia*, 428 U.S. at 204).

Gray at 63 (citations omitted). *See also Peterson v. Murray*, 904 F.2d 882 (4th Cir. 1990) (Virginia's statutory scheme designed to strictly limit access to juvenile records did not prohibit use of defendant's juvenile record in capital sentencing.)

There is no merit to this claim.

10. <u>Petitioner's Simmons Claim has Merit (Claim 1)</u>.

In January, 1993, applicable Virginia law precluded informing a jury, even in response to a request for information, about a defendant's parole status and whether defendant was parole eligible. In *Mueller v. Commonwealth*, 422 S.E.2d 380 (Va. 1992), decided only four months before petitioner's trial, the Supreme Court of Virginia said:

> Mueller argues that the trial court violated his due process rights by refusing to instruct the jury that, pursuant to code section 53.1-151(B1), he would not be eligible for parole if convicted of the rape of Charity Powers, since this would be his third rape conviction. He also asserts that he should have been allowed the opportunity to introduce evidence regarding parole ineligibility in mitigation of punishment at the penalty phase of the trial.
>
> We hold that the trial court did not err in its rulings here. This Court has held uniformly and repeatedly that information regarding parole eligibility is not relevant for the jury's consideration.
>
> Further, the United States Supreme Court has expressly left the determination of this question to the individual states, as a matter of state law. *California v. Ramos*, 463 U.S. 992, 1013-14, 103 S.Ct. 3446, 3459-60, 77 L.Ed.2 1171 (1983). We perceive no reason in the case before us to depart from our prior rulings on this subject.

Mueller, 422 S.E.2d at 394 (citations omitted).

The court went on to note "[t]hus, this court has drawn a clear distinction between the admissibility of a defendant's parole history and evidence of his future parole eligibility." *Id.* at 394-95.

During the course of trial, the Commonwealth introduced direct evidence that petitioner was on parole in September, 1992, when the predicate crimes were committed (1/29/93 Tr. at 85-86); obtained an admission, during cross-examination, that petitioner was paroled in May and acquired a gun as early as July, 1992; and questioned petitioner about parole violations in 1986, petitioner's absconding from parole, and a subsequent robbery, while a fugitive, (1/29/93 Tr. at 201-02). Thus, petitioner's performance, as a parolee, was before the jury.

At the time of trial, in January, 1993, petitioner had been tried and convicted of two counts of robbery and two counts of use of a firearm in the commission of a robbery at a Pizza Hut, sentenced by a jury to a term of seventy-six years imprisonment, and the court had imposed the sentence. (1/29/93 Tr. at 133.) He had also been tried and convicted of two counts of robbery and one count of the use of a firearm at a Dominos Pizza, and was sentenced by the jury to a term of eighteen years, but the sentence had not yet been imposed. (1/29/93 Tr. at 134.) The sentence was imposed on February 18, 1993, after conclusion of the trial which is the subject matter of this appeal, but before actual imposition of the punishment by the trial court.

On January 29, 1992, there were two statutes on the books which addressed parole eligibility and length of incarceration in cases involving serious criminal offenses.

First, section 53.1-151(B1) of the Virginia Code states, in part,

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii), or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

The second statutory provision, section 53.1-151(C) of the Virginia Code reads, in part,

> Any person sentenced to life imprisonment for the first time shall be eligible for parole after serving fifteen years, except that if such sentence was for a Class I felony violation . . . he shall be eligible for parole after serving twenty-five years, unless he is ineligible for parole pursuant to Subsection (B1) . . .

A Class I felony is any felony carrying a penalty of death or imprisonment for life.

Because Virginia law prohibited disclosure to the jury of information regarding petitioner's parole eligibility, no instruction to that effect was sought. However, in the course of deliberating on petitioner's punishment, the jury sent a question to the court: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" (1/29/93 Tr. at 278.)

The immediate response of the Commonwealth was to advise the court of the language of the model jury instructions "that you are to decide what a just punishment is and not to concern yourself with what happens thereafter," based upon Virginia Model Jury Instruction 2.7000. (1/29/93 Tr. at 278.) In response thereto, petitioner's counsel made the following statement:

> MR. PIOTROWSKI: Your Honor, obviously I don't think that that answer is sufficient for the circumstances. I'm trying to suggest the wording and I anticipated this question and I hoped to have it written out for you, I don't, I'm trying to formulate it in my mind right now.
>
> I believe that the Court (sic) should be told that they can not concern themselves with what will occur after they impose their sentence.
>
> I feel, however, Your Honor, though that the question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time.
>
> I'm looking for some kind of language that would balance out that perception. A suggestion that I have here in front of me is – I wrote as we talked, is that "You must not concern yourself with matters that will occur after you impose your sentence, but you may impose that your sentence will be the legal sentence imposed in the case."
>
> I'm open to any other suggestions.

(1/29/93 Tr. at 278-79.)

It is apparent that trial counsel was familiar with prevailing Virginia law but appropriately concerned

about the jury's "perception" that petitioner would be out in a short period of time.

The court responded by quoting the Virginia Model Jury Instruction and stating to counsel "that's what the law is; isn't it, Mr. Piotrowski?" (*Id.* at 279.) In response, defense counsel acknowledged that that instruction had been given in the past but further responded stating, "I think a situation like this, when you're talking about a death case, when the issue's this crucial, that something more than that is necessary because their concern is parole which they aren't allowed to be told about." (1/29/98 Tr. at 280.)

The court sustained the Commonwealth's objection, informed the jury, pursuant to the Virginia Model Jury Instruction, that they should impose what they felt was a fair and just sentence and not concern themselves with the consequences, and the jury responded by sentencing petitioner to death. (*Id.* at 281.)

It is important to note at this point that trial counsel was not obligated to offer or argue for a specific instruction, contrary to controlling Virginia law, and counsel was not constitutionally defective for failing to anticipate a new rule of law. *United States v. McNamara*, 74 F.3d 514 (4th Cir. 1996).

Thereafter, the issue was preserved at every stage of the appellate process.

On direct appeal, petitioner argued that the trial court committed error in refusing to respond to the jury question in a way that would make the jury aware that he would be ineligible for parole upon his conviction of

capital murder in derogation of the Eighth and Fourteenth Amendments to the United States Constitution. The assignment was rejected on direct appeal. *Ramdass*, 437 S.E.2d at 425-26.

In a petition seeking a writ of *certiorari* from the United States Supreme Court, the issue was raised in the context of the court's refusal to respond informatively to the jury inquiry regarding petitioner's parole status.

That petition for *certiorari* was granted, and on remand, the sole issue addressed by petitioner was "whether the Due Process Clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." (App. Brief at ii, Appeal to Va. S.Ct. No. 930693.)

The matter was resolved in a brief opinion issued November 4, 1994, in which the Virginia Supreme Court, in perfunctory fashion, decided that *Simmons* was not an issue on the basis that petitioner was not parole ineligible on January 29, 1993. *Ramdass v. Commonwealth*, 450 S.E.2d 360 (1994). About this, more will be said later.

Thereafter, a second petition for writ of *certiorari* was taken to the Supreme Court of the United States incorporating the same issue. The petition was denied. *Ramdass v. Virginia*, 514 U.S. 1085 (1995).

Next, in a state habeas petition, the issue was addressed as an assignment of trial court error in the specific *Simmons* context. The claim was rejected on the basis of *Hawks v. Cox*, 175 S.E.2d 271 (Va. 1970), the issue

having previously been decided by the Virginia Supreme Court.

Thus, the issue has been preserved at every stage and is before the Court for consideration.

Further, since the writ of *certiorari* was pending in the United States Supreme Court at the time *Simmons* was decided, and the petition for *certiorari* was granted post-*Simmons*, there is no retroactive application required, and as to petitioner, the *Simmons* holding does not constitute a new rule. "A state conviction and sentence become final for purposes of retroactivity analysis when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). *See also O'Dell v. Netherland*, 95 F.3d 1214, 1221 (4th Cir. 1996).

Further, under the doctrine in *Teague v. Lane*, 489 U.S. 288, 301 (1989), a new rule is created if the result was not dictated by precedent existing at the time petitioner's conviction became final. This Court finds that the rule articulated in *Simmons*, "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible," compelled a finding by the Virginia Supreme Court, on remand, that petitioner was entitled to inform the jury, prior to sentencing, of his parole status. *Simmons*, 512 U.S. at 156.

On remand, Justice Whiting, the author of the original opinion following petitioner's direct appeal, concluded that petitioner was ineligible for parole, stating:

> At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B1). They were:
>
> (1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered as one felony offense under the express provisions of Code § 53.1-151(B1).
>
> (2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B1).
>
> We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1-151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592-93, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the *Simmons* decision does not affect his death sentence.

Ramdass v. Commonwealth, 450 S.E.2d at 361.

It did not seem to bother Justice Whiting that on January 29, 1993, although judgment had not been entered on the robbery or murder of Kayani, petitioner had been convicted.

Petitioner essentially presents four arguments in support of the position that the court's failure to allow consideration of petitioner's parole ineligibility violated his Eighth and Fourteenth Amendment rights: first, that the Virginia Supreme Court decision was ultra vires, arguing that it is for the parole board to determine parole eligibility; second, that the Virginia Supreme Court decision was arbitrary, arguing that it was internally inconsistent, ignored Virginia authority, and contravened the plain language of the statute; third, that to deny the jury the information violates petitioner's Eighth Amendment rights; and fourth, that both the trial court and the Virginia Supreme Court acted arbitrarily in the actual imposition of the sentence since, at that point in time, petitioner had not only been convicted of the predicate offenses involved in the trial which is the subject of this action, but had been tried and sentenced for a fourth robbery at the Bragg Hotel and was, thus, unquestionably ineligible for parole.

The respondent treats the *Simmons* claim as *de minimis*.

In a two and one-half page reply, one full page is devoted to a long quote from the opinion. The respondent

relies almost exclusively upon the argument that the finding of parole ineligibility is a finding of historical fact entitled to a presumption of correctness, citing *Sumner v. Mata*, 449 U.S. 539 548-49 (1981), and concludes that petitioner's arguments, which are different from those presented to the Virginia Supreme Court, are now barred from review. The state seems to take great comfort in the fact that upon remand, when petitioner's counsel were entitled to file a reply brief in response to the Commonwealth's argument that petitioner was not ineligible for parole, they did not do so. However, until the Supreme Court determined, in fact, that petitioner was not eligible for parole, there was no issue of parole eligibility to which petitioner was obligated to respond. After all, the prosecutor never suggested to the trial court that petitioner was parole ineligible in the course of objecting to a response to the jury's question in language other than that provided by the Virginia Model Jury Instructions.

Until the Virginia Supreme Court determined that petitioner was parole ineligible, the issue did not exist.

Petitioner's reply brief essentially repeats the arguments raised in the petition, except for an additional argument that if there are any defaulted claims that pertain to the *Simmons* issue and which were not raised by state habeas counsel, petitioner argues that state habeas counsel were constitutionally ineffective, and petitioner is entitled to raise such matters herein. The issue is moot. The case upon which petitioner relies, *MacKall v. Murray*, 109 F.3d 957 (4th Cir. 1997), which suggested entitlement to effective assistance of counsel in the first habeas proceeding, was vacated in *MacKall v. Angelone*, 131 F.3d 442, 449 (1997), when the Fourth Circuit said, "[b]ecause

MacKall has no right to effective assistance of counsel in his state habeas proceedings, he cannot demonstrate cause to excuse the procedural default of his claims that his trial and appellate counsel were constitutionally ineffective. Consequently federal habeas review of those claims is barred."

The respondent's reply adds nothing to the argument.

Simmons is an extremely important constitutional case. It establishes a principle that goes beyond the narrow nature of the holding. In *Simmons*, the sole question was whether a defendant, facing the death penalty and then statutorily ineligible for parole under state law, had the right to inform the jury of his parole ineligibility when the state relied upon his alleged future dangerousness in seeking the death penalty.

Simmons represents the most recent in a series of cases incrementally refining the process of applying the death penalty by expanding, first, the sentencer's knowledge, and second, an accused's right to respond to arguments advanced by the sovereign for the imposition of the death penalty.

In *Gregg v. Georgia*, 428 U.S. 153 (1976), Justice Stewart said:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate information about a defendant and the crime he committed in order to be able to impose a rational sentence in the typical criminal case, then accurate sentencing information is an indispensable prerequisite to a reasoned

> determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.

Id. at 190.

In *Gardner v. Florida*, 430 U.S. 349 (1977), petitioner was sentenced to death based upon an aggravating factor contained in a presentence investigation report that the Court had ordered, but portions of which were not disclosed to or requested by counsel for the parties. In setting aside the conviction, the Court stated, succinctly, "[w]e conclude that petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362.

In *Lockett v. Ohio*, 438 U.S. 586 (1978), a death penalty was set aside because the limited range of mitigating circumstances that could be considered by the sentencer under the Ohio death penalty statute was deemed to be incompatible with the Eighth and Fourteenth Amendments. The Court concluded that except in the most unusual of circumstances, a sentencer may not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any of the circumstances of the offense proffered as a basis for a sentence less than death.

In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the trial court refused, as a matter of law, to consider in mitigation circumstances concerning defendant's childhood and certain emotional disturbances, and found that the only mitigating circumstance was his youth. In setting aside the sentence, Justice Powell said

> We find that the limitations placed by these courts upon the mitigating evidence they would consider violated the rule in *Lockett*. Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, *as a matter of law*, any relevant mitigating evidence.

Id. at 113-14.

In *California v. Ramos*, 463 U.S. 992 (1993), the Court addressed the issue of whether it was constitutional to require that the trial judge inform the jury that a sentence of life imprisonment without the possibility of parole may be commuted by the governor to a sentence that includes the possibility of parole, thus informing the jury that a prisoner sentenced to life without parole could eventually gain freedom. In permitting the disclosure, the jury received nothing more than an accurate statement of California law. In upholding the right of the state of California to so inform a jury, the court stated "[t]he Briggs Instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence." *Id.* at 1004

In *Barclay v. Florida*, 463 U.S. 939 (1983), petitioner was sentenced to death by the trial court, contrary to the jury's advisory recommendation that petitioner be sentenced to life. In written findings, the trial judge concluded that petitioner's behavior in the course of committing the crimes, and the nature of the crimes themselves, all of which were aggravating factors, were not offset by any mitigating factors and that the death

penalty was the o[illegible] appropriate sentence. The judgment was ultimately affirmed by the Florida Supreme Court and subsequently by the United States Supreme Court. In so doing, Justice Rehnquist noted that "[t]he United States Constitution does not prohibit a trial judge from taking into account the elements of racial hatred in this murder." *Id.* at 949. The Chief Justice went on to state:

> Any sentencing decision calls for the exercise of judgment. It is neither possible nor desirable for a person to whom the State entrusts an important judgment to decide in a vacuum, as if he had no experiences. The thrust of our decisions on capital punishment has been that "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

Id. at 950 (quoting *Zant v. Stephens*, 462 U.S. 8962, 874 (1983)).

In *McCleskey v. Kemp*, 481 U.S. 279 (1987), the Court said, "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *Id.* at 306.

Finally, prior to *Simmons*, *Skipper v. South Carolina*, 476 U.S. 1 (1986) was decided. In that case, the trial court ruled that evidence that the defendant has made a good adjustment to confinement was irrelevant and inadmissable, and the testimony of two jailors [sic] and a regular visitor to the jail to that effect was excluded by the trial

court. Thereafter, the defendant was sentenced to death. In reversing the conviction, the Supreme Court said

> The evidence petitioner was allowed to present on the issue of his conduct in jail was the sort of evidence that a jury naturally would tend to discount as self-serving. The testimony of more disinterested witnesses – and, in particular, of jailers who would have had no particular reason to be favorably predisposed toward one of their charges – would quite naturally be given much greater weight by the jury. Nor can we confidently conclude that credible evidence that petitioner was a good prisoner would have had no effect upon the jury's deliberations. The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates. Under these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error.

Id. at 8.

Thus, we arrive at *Simmons*. In *Simmons*, as in the case before the Court, the state relied on future dangerousness as a factor for the jury to consider in determining whether Simmons should be sentenced to death or given life imprisonment for the murder of an elderly woman. *Simmons*, 512 U.S. at 157. Petitioner in that case presented evidence that his future dangerousness was limited to

elderly women and, therefore, the jury would have no reason to expect violent acts from him in prison. However, he was unable to persuade the trial court to give the jury an instruction which advised them that he was ineligible for parole under South Carolina law. *Id.* at 158.

During deliberations in the sentencing phase of the case, the jury posed the question of whether life imprisonment carried with it the possibility of parole. As in Virginia, the court instructed the jury not to consider parole in reaching its verdict and further said, "the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning." *Simmons* at 160. Twenty-five minutes later, the jury returned with the sentence of death. *Id.*

The issue on appeal was whether the jury was entitled to know that petitioner was, in fact, ineligible for parole. In a seven to two opinion, the Court concluded that the jury was so entitled. There are five separate opinions in the case. Justice Blackman wrote the opinion for the Court, in which Justices Stevens, Souter, and Ginsburg joined. They stated: "We think it clear that the state denied petitioner due process. . . . where the jury has sentencing responsibilities in a capital trial, many issues that are irrelevant to the guilt-innocence determination step into the foreground and require consideration at the sentencing phase." *Id.* at 163. They continued:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a

> defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause. . . .

Id. at 162-66.

They concluded: "[T]he jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested." *Id.* at 165-66.

In a concurring opinion, Justice Souter addressed the "need for heightened reliability," asserting that a jury is entitled to know "the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives." *Id.* at 172 (Souter, J., concurring). Justice Stevens joined in the concurrence.

In a second concurring opinion, Justice Ginsburg wrote:

> This case is most readily resolved under a core requirement of due process, the right to be heard. . . . defendant's right to be heard means that he must be afforded an opportunity to rebut the argument. . . . To be full and fair, that opportunity must include the right to inform the jury,

> if it is indeed the case, that the defendant is ineligible for parole.

Id. at 174 (Ginsburg, J., concurring) (citations omitted).

Finally, in a concurring opinion by Justice O'Connor, joined by Chief Justice Rehnquist and Justice Kennedy, the Court stated:

> [D]espite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id. at 177.

Thus the theme in all of the cases, concluding with *Simmons*, is dual: First, due process requires that a defendant be permitted to introduce, and the sentencer consider, all relevant evidence that may be viewed in a mitigating light by the sentencer, (*Skipper, McCleskey, Barkley, Eddings, Lockett*), and second, that a defendant must have both access to information upon which the sentencer relies in imposing the death penalty, (*Gardner, Simmons*), and the opportunity to rebut the same (*Gardner, Lockett, McCleskey, Skipper, Simmons*). In fact, accurate information conveyed by the court, to the sentencer, is constitutionally encouraged, (*Ramos*), without regard to how the information may be received and, in the context of the ability of a defendant, necessarily, to be able to respond.

Applying *Simmons*, and its predecessors, to the case now before the Court, the Court finds that *Simmons* is controlling and that petitioner's case should have been remanded to the Circuit Court of Fairfax County for resentencing.

A writ of habeas corpus may not be granted:

> [W]ith respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding

28 U.S.C. § 2254(d).

Recognizing this, the Court finds that the case of *Ramdass v. Commonwealth*, 450 S.E.2d 360 (Va. 1994), represents "a decision . . . contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States," and constitutes "a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §§ 2254(d)(1) and (2).

There are two elements of the decision which pose a problem. First, there is a bold determination that petitioner is not parole ineligible. Without regard to who has the ultimate authority to make that decision, it is fair to say that parole eligibility, in the context of the appellate

issue raised, is at least a mixed question of law and fact, and thus, the judgment was within the authority of the Virginia Supreme Court. Having said that, the judgment is puzzling.

The Virginia Supreme Court relied upon section 53.1-151(B1) of the Virginia Code, and the statutory language establishing parole ineligibility in the event of three convictions for the defined offenses. It then went on to conclude that on the day of trial, when the jury asked the question of whether there was "a possibility of parole at some time before his natural death" that petitioner had only two qualifying convictions – the Pizza Hut robbery, for which he had already been sentenced to seventy-six years, and the robbery of the 7-11 and murder of the 7-11 clerk, the very offenses still before the trial court for resolution. It concluded that the Domino's Pizza conviction did not qualify because even though petitioner had been sentenced to serve eighteen years, that sentence was, in fact, not imposed until February 18, 1993, two and one-half weeks after conclusion of the death sentence trial. *Ramdass*, 450 S.E.2d at 361.

An obvious question arises from the court's reasoning: If the Domino's Pizza jury verdict, which preceded commencement of the trial, does not constitute a conviction for purposes of ineligibility for parole, how then could the immediate offenses for which petitioner was still being tried constitute a second predicate conviction?

The second puzzling part of the decision has to do with the definition of the phrase "conviction." In a terse two-line statement, the Supreme Court stated

> We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code section 53.1-151(B1).

Ramdass, 450 S.E.2d at 361.

The only case cited in support of the decision is *Smith v. Commonwealth*, 113 S.E.2d 707, 709 (Va. 1922), a case turning on the issue of what constitutes a conviction for the purpose of removing a constitutional officer from public office.

However, there are other significant Virginia cases which address the issue in a far more appropriate context.

In *Fields v. Commonwealth*, 361 S.E.2d 359 (Va. 1987), the Virginia Court of Appeals found that a convicted felon, testifying before the imposition of sentence, was "convicted" for purposes of impeachment. *Id.* at 361.

The *Fields* court relied upon *Lincoln v. Commonwealth*, 228 S.E.2d 688 (1976), a case in which the Virginia Supreme Court held that two accomplices, who had testified against a co-defendant and who had entered guilty pleas and stood convicted but had not been sentenced, were "convicted" felons for the purpose of attacking their credibility.

In *Blair v. Commonwealth*, 66 Va. (25 Gratt) 850 (1874), the court concluded that under the Constitution of Virginia, the governor has the authority to pardon the

person convicted of a felony before the sentence is passed; it is the act of conviction by the jury that governs.

In *United States v. Hartwell*, 26 F.Cas. 196, an 1869 decision of the Circuit Court for the District of Massachusetts, the issue was addressed by the court stating, "[c]onviction may accrue in two ways, either by the party confessing his offense and pleading guilty, or by his being found guilty by the verdict of a jury." *Id.* at 201 (citing 4 Blackstone's Commentaries 362). "Omission to sentence the principal defendant cannot make any difference as to the effect of the plea, as it is well settled that the conviction of the principal is sufficient without any judgment to constitute *prima facie* evidence of his guilt in a trial of the accessary. *Id.* In arriving at this opinion, the Massachusetts court cites *Commonwealth v. Williamson*, 2 Va. Cas. 211, an 1820 Virginia opinion.

In *Deal v. United States*, 508 U.S. 129 (1993), involving multiple counts of bank robbery and carrying and using a firearm in the commission of a crime, defendant faced the certainty of enhanced punishment for violation of 18 U.S.C. § 924(c)(1), involving the use of a firearm during and in relation to a crime of violence. Petitioner argued that his multiple convictions arose in a single proceeding and did not permit the sentence enhancements authorized by the statute. Justice Scalia, delivering the opinion of the court, made clear that statutory language "cannot be determined in isolation, but must be drawn from the context in which it is used." *Id.* at 132. Following an analysis of petitioner's arguments, Justice Scalia concluded "[i]n the context of section 924(c)(1), we think it unambiguous that 'conviction' refers to the finding of

guilt by a judge or jury that necessarily preceeds [sic] the entry of a final judgment of conviction." *Id.*

In *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), a conviction for a state felony of carrying a concealed handgun, which was subsequently expunged following petitioner's successful completion of a period of probation, nevertheless constituted a "conviction" for the purpose of a subsequent revocation of a federal firearms dealer and manufacturer license. Justice Blackman [sic] stated:

> [E]xpunction does not alter the legality of the previous conviction and does not signify that the defendant was innocent of the crime to which he pleaded guilty. Expunction in Iowa means no more than that the state has provided a means for the trial court not to accord a conviction certain continuing effects under state law. Clearly, firearms disabilities may be attached constitutionally to an expunged conviction . . . and an exception for such a conviction, unlike one reversed or vacated due to trial error, is far from obvious.

Id. at 115 (citations omitted).

It is the conviction, the act of finding an individual guilty, that was addressed by the legislature, without the requirement of an intervening sentence in section 53.1-151(B).

Finally, though the distinction was not acknowledged by the Virginia Supreme Court, it is critical to the resolution of this issue to note that the statute in question, section 53.1-151(B1) of the Virginia Code, addresses "any person convicted . . . ," as opposed to "convicted and

sentenced." As Judge Clarke noted in *Krawetz v. Murray*, 742 F. Supp. 304 (E.D. Va. 1990),

> The starting point in any case involving the interpretation of a statute is the statute itself. When, as here, the language of the statute is clear, the court must enforce it according to its terms, for rewriting the statute is not the province of the judiciary. Giving effect to the plain meaning of the language used in Virginia Code 53.1-151, it is pellucidly clear that in order to increase a defendant's time before being eligible for parole, that defendant must not only have been convicted of a felony, but also sentenced and committed to a "state correctional facility" or some other institution under the control of the Department of Corrections. This Court can only presume that the legislature of Virginia intended to give Virginia judges leeway to exercise some discretion to sentence some convicted felons more leniently than others.

Id. at 307.

Here, "the language of the statute is clear," and a defendant, convicted three times, is ineligible for parole. Petitioner had been convicted and sentenced twice on January 29, 1993. The actions of the jury contemplating his fate resulted in his third "conviction" for murder, and a sentence of life would have resulted in petitioner being parole ineligible.

Further, it is appropriate to note that the question asked by the jury was not couched in terms of actual parole eligibility, but instead, whether there was "a possibility of parole at some time before his natural death," logically suggesting that the jury believed that if they

gave him a life sentence, that it would be a significant sentence but that there was a possibility of release.

This Court does not believe that *Simmons* was limited to the very narrow issue of specific parole eligibility or lack thereof. The language of the Justices constituting the seven person majority makes clear their concern that a jury be correctly informed about a defendant's status when the choice is between the imposition of the death penalty or the imposition of a "life" sentence. Given the fact that there is no provision in law that defines a "life" sentence, nor was one required in Virginia, the jury had no way of knowing how much time that involved.

On January 29, 1993, the court, the prosecutor, the defense team, and the jury all knew that petitioner had a dysfunctional up-bringing, devoid of necessary physical, emotional, and moral support; that he began his criminal career at an early age; that he was an abject failure on parole; and that he had violent propensities. He had little going for him except his age. The jury manifested their concern about whether, before he died, he could be released. *Simmons* stands for the proposition that the jury, balancing life and death, had the right to an informed answer.

Had the trial court informed the jury of the two provisions of section 53.1-151(B1) of the Virginia Code, the jury would have known that as a result of the number of convictions received by petitioner, he was then ineligible, by statute, for parole and second, that because he had been convicted of murder, that he would required [sic] to serve, as an absolute minimum, twenty-five years. It is difficult to imagine how either side could have been

prejudiced by the conveyance of such information to the jury, and the jury would have been allowed to make an informed decision, precisely the point in *Simmons*.

The Virginia Supreme Court's response, on remand, imposes limits on the application of *Simmons* not fairly contemplated by the language in the opinion, requires an inconsistent treatment of two separate convictions, and contradicts more than one hundred years of Virginia law that says a conviction occurs when the jury renders the verdict.

III. RECOMMENDATION

For the foregoing reasons, the Court finds that all of petitioner's claims, save and except Claim 1, should be DISMISSED, but that a petition for writ of habeas corpus should be GRANTED as to Claim 1, and the case remanded to the Circuit Court of Fairfax County for the sole purpose of resentencing.

It is further recommended that the Court DENY petitioner's request for an evidential hearing in light of the complete trial and appellate record and the total absence of substantive issues requiring factual development in the context of collateral review.

IV. REVIEW PROCEDURE

By copy of this Report and Recommendation, the parties are notified that pursuant to 28 U.S.C. § 636(b)(1)(C):

1. Any party may serve upon the other party and file with the Clerk written objections to the foregoing

findings and recommendations within 10 days from the date of mailing of this report to the objecting party, *see* 28 U.S.C. § 636(b)(1)(C) and Federal Rule of Civil Procedure 72(b), computed pursuant to Rule 6(a) of the Federal Rules of Civil Procedure, plus three days permitted by Rule 6(e) of said rules. A party may respond to another party's objections within ten (10) days after being served with a copy thereof.

2. A district judge shall make a *de novo* determination of those portions of this report or specified findings or recommendations to which objection is made.

The parties are further notified that failure to file timely objections to the findings and recommendations set forth above will result in waiver of right to appeal from a judgment of this court based on such findings and recommendations. *Thomas v. Arn*, 474 U.S. 140 (1985); *Carr v. Hutto*, 737 F.2d 433 (4th Cir. 1984); *United States v. Schronce*, 727 F.2d 91 (4th Cir. 1984).

/s/ James E. Bradberry
UNITED STATES MAGISTRATE JUDGE

Newport News, Virginia
February 26, 1998

Bobby Lee RAMDASS, Petitioner,

v.

Ronald J. ANGELONE, Director of Virginia Department of Corrections, Respondent.

No. CIV. A. 2:96CV831.

United States District Court,
E.D. Virginia,
Norfolk Division.

Aug. 14, 1998.

Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Capital Habeas Litigation Section, Richmond, VA, for Ronald J. Angelone.

John M. Ryan and Nash F. Bilisoly, Vandeventer, Black, Meredith and Martin, LLP, Norfolk, VA, Michele J. Brace, Robert Edward Lee, Jr., Mark E. Olive, Virginia Capital Representation Resource Center, Richmond, VA, for Bobby Lee Ramdass.

OPINION AND FINAL ORDER

JACKSON, District Judge.

In January, 1993, Petitioner was convicted in the Circuit Court of Fairfax County, Virginia for the September, 1992 murder of Mohammad Z. Kayani, a convenience store clerk. Pursuant to the jury's recommendation, on April 2, 1993, the court sentenced Petitioner to death. Subsequently, Petitioner exercised his state appeals to no avail. On March 11, 1997, Petitioner filed an amended petition for a federal writ of habeas corpus, pursuant to

28 U.S.C. § 2254,[1] alleging violations of federal constitutional rights during his conviction and sentencing. This matter comes before the Court on Respondent's April 28, 1997 motion to dismiss the petition. On June 3, 1997, Petitioner filed a response to Respondent's motion to dismiss. On June 26, 1997, Respondent filed a reply to Petitioner's response.

Pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and (C), Rule 72(b) of the Federal Rules of Civil Procedure, and Rule 29 of the Rules of the United States District Court for the Eastern District of Virginia, the matter was referred to a United States Magistrate Judge for Report and Recommendation ("R & R"). On February 27, 1998, the Magistrate Judge filed his R & R. He found merit in one ground in the petition and recommended that the motion to dismiss be denied and that Petitioner's case be remanded for resentencing.

By copy of the R & R, each party was advised of his right to file written objections to the findings and recommendations made by the Magistrate Judge. On March 30, 1998, this Court received "Petitioner's Objections to Magistrate Judge's Report and Recommendation" and "Respondent's Objections to the Magistrate Judge's Report and Recommendation." On April 13, 1998, both parties filed respective replies to the objections.

With some exceptions, Petitioner objects to the Magistrate Judge's recommendations to deny certain claims on the basis of procedural default. Of the claims the Magistrate Judge addressed on the merits, Petitioner does

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[1] On February 14, 1997, Petitioner filed his initial petition.

not contest the ultimate recommendation to order Petitioner's resentencing; however, he does object to the recommendations to deny the remaining claims on the merits. Further, Petitioner maintains that he is entitled to conduct discovery and present evidence on his claims which were denied on the merits. Respondent disagrees with the standard the Magistrate Judge utilized in concluding that certain claims were not procedurally defaulted and the recommendations that certain claims were not procedurally defaulted. Additionally, Respondent objects to the ultimate recommendation to remand Petitioner's case for resentencing. Both parties object to the standard of review the Magistrate Judge applied when evaluating claims on the merits.

Pursuant to Rule 72(b) of the Federal Rules of Civil Procedure, the Court, having reviewed the record in its entirety, shall make a de novo determination of those portions of the Magistrate Judge's R & R to which the parties specifically objected. The Court may accept, reject, or modify, in whole or in part, the recommendation of the Magistrate Judge, or recommit the matter to him with instructions. 28 U.S.C. § 636(b)(1).

I. FACTS AND PROCEDURAL HISTORY

The R & R contains a detailed statement of the facts surrounding the crime, Petitioner's conviction and sentencing, and subsequent state appeals. (R & R 2-17.) The Court adopts the Magistrate Judge's explication of facts, with some modifications. The facts and procedural history are as follows.

A. Facts

During the night of September 1, 1992, and early morning of September 2, 1992, Petitioner and Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh,[2] Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. The restaurant was closed. Instead, the men, including Petitioner, decided that they would rob persons at a 7-Eleven store on Buelah Street in Fairfax County.

Near one o'clock on the morning of September 2, 1992, the five men entered the 7-Eleven store. Petitioner entered first and "drew" his pistol on Kayani, a clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and to not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes, Kool Aid and lottery tickets from the store's stock.

After Petitioner ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Petitioner squatted next to Kayani and yelled at him to open the safe "or I'll blow your f – head

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[2] For this crime, Singh had plead guilty to murder as a principal in the second degree, robbery, and use of a firearm in the commission of a robbery as a principal in the second degree. He testified that he faced three life sentences plus six years. (1/27/93 Tr. 202.) In exchange for his testimony, charges for other robberies in which he had participated were dropped.

off.[3]" *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566, 568 (Va.1993). At approximately the same time, Wilson fired his pistol at one of the customers lying on the floor. (1/27/93 Tr. at 206-07.) Immediately thereafter, Singh, standing behind Petitioner, saw Petitioner shoot Kayani in the head on his second attempt to get the weapon to fire. (1/27/93 Tr. at 211-12.) Testifying about the precise moment of the shooting, Singh stated that Petitioner "[c]licked it once and it didn't go off, clicked it again and it went off." (*Id.*)

Just after Petitioner shot Kayani, Ramirez testified that he returned from a back room in the store. Ramirez saw Petitioner laughing as he stood over Kayani's body. (1/27/93 Tr. at 145.)[4] Shortly thereafter, Ramirez opened the front door and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he urged Petitioner to "[c]ome on." (*Id.* at 146.) However, Petitioner was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." (*Id.*) One of the customers also heard the clicking of the gun as Petitioner left. (1/27/93 Tr. at 125, 129-30.)

When they got in the car, Ramirez heard Petitioner ask Wilson, "[w]hy didn't you get rid of the people on the floor?" (*Id.* at 146.) After the men divided the robbery proceeds at Singh's home, Petitioner told Ramirez,

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[3] Another employee of the 7-Eleven store testified that a clerk could not open the part of the safe containing most of the money because the store manager had the keys.

[4] Later, Ramirez heard Petitioner say that he shot Kayani because he "took too long." (1/27/93 Tr. at 147.)

"[d]on't tell anybody about this [o]r I'll kill you and I'll kill your whole family." (1/27/93 Tr. at 146-47.)

Singh, a co-owner of the gun with Petitioner, testified that the gun would not fire unless held at a certain angle because the bullets in the cylinder were not the right size for the gun. (*Id.* at 213.) Singh was corroborated by Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, who later examined and test-fired the gun. (*Id.* at 245, 248.) Mason testified that the 9 millimeter cartridges Petitioner used in the gun were smaller than the .38 caliber cartridges designed for the gun. Consequently, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward in the cylinder to be struck by the firing pin. (*Id.* at 250-51.) Mason further testified that when the muzzle was pointed up, the cartridges slid back closer to the firing pin, and the gun could be fired. (*Id.* at 251.)

On direct, after stipulating as to her expertise, the medical examiner testified that the bullet which killed Mr. Kayani entered the left side of his head, just above the left ear, traveled forward, upward and rightward exiting out the right side of his head. (*Id.* at 99-100.) On cross examination, the medical examiner was questioned in more detail about the track of the bullet through the head and revealed that powder burns and debris were found on Kayani's head. (*Id.* at 102.)

Based on the evidence, the jury convicted Petitioner of capital murder and the use of a firearm in the commission of a felony. The case proceeded to the capital sentencing phase. The Commonwealth, in seeking the death penalty, relied solely upon the "continuing serious threat

to society" condition, also known as "future dangerousness." In support of its position, the Commonwealth introduced evidence of Petitioner's use of a firearm and participation in the robbery of a Pizza Hut on August 25, 1992; robbery on August 29, 1992, of a hotel night clerk, who was physically beaten by Petitioner and threatened with a gun during the robbery; use of a firearm and robbery of a Domino's Pizza restaurant on August 30, 1992; and a second robbery and attempted murder, on August 30, 1992, of a taxi driver, who was shot in the head by Petitioner. At the time of trial, Petitioner had been convicted of the Pizza Hut and the Domino's Pizza crimes and formally sentenced for the Pizza Hut robbery. At the time judgment was imposed by the court for the 7-Eleven crimes, Petitioner had additionally been convicted and sentenced for the hotel robbery and formally sentenced for the Domino's robbery.

In opening statements, which had been reserved, defense counsel argued that Petitioner need not be sentenced to death on the basis of future dangerousness because he was already required to serve at least 99 years in jail. The length of the term precluded release and eliminated any future threat to society. Toward the end of the opening, trial counsel stated: "Bobbie Lee Ramdass was a bad boy. He's a bad man. He's committed crimes of violence in the past. He won't stand up here and tell you that he won't commit crimes of violence in the future." (1/29/93 Tr. 98.)

Trial counsel informed the jury of Petitioner's extensive juvenile record. Beginning in 1985, Petitioner came before the Court for a purse snatching, for which he received probation, (1/29/93 Tr. at 198-99); theft of a

moped and a burglary, for which he was sentenced to a juvenile facility, (1/29/93 Tr. at 200); being a juvenile escapee, (1/29/93 Tr. at 201); and robbery as a juvenile, for which he received an adult sentence to Southampton prison, (1/29/93 Tr. at 17-18, 202). The jury also learned that Petitioner acquired his first gun at age thirteen or fourteen, while he was selling drugs, (1/29/93 Tr. at 149-51); that he was in possession of a loaded gun when he was arrested, as a juvenile, and charged with robbery, (1/29/93 Tr. at 24); and that he violated his parole, which began on May 21, 1992, by acquiring a gun on July 4, 1992, less than sixty days later, (1/29/93 Tr. at 85-86, 202).

Furthermore, the defense presented evidence of a bleak, abusive, unstructured childhood. Petitioner was physically and emotionally abused and raised in conditions of severe deprivation. There was no positive guidance.

Petitioner's brother, Mark Ramdass, testified on Petitioner's behalf. After admitting that he would not have appeared without being subpoenaed, Ramdass described his brother's efforts to protect him and to try to keep him out of trouble. (1/29/93 Tr. 103-05.) He also acknowledged his brother's numerous encounters with the law and incarceration, and admitted his own criminal activities, resulting in two felony convictions. (*Id.* at 112.) At one time, Petitioner and the witness were both at Southampton Correctional facility. (*Id.* at 113.)

Petitioner's mother testified that she was one of twenty-one children and that she was sexually abused and ran away from home at an early age. (*Id.* at 217.) She was working as a topless dancer when Petitioner was

born. (*Id.* at 219.) She acknowledged being convicted of writing a bad check and two assault and battery charges. She also confirmed that she twice lost custody of her children for neglect. (1/29/93 Tr. 227-28.) She described how Petitioner was physically abused by a boyfriend and how she taught petitioner to defend himself. She admitted assaulting a former boyfriend and a neighbor. (*Id.* at 232.)

Jennifer Joffe, a Virginia probation/parole officer, was called by the defense. She had prepared the probation report following Petitioner's 1988 conviction for robbery. (*Id.* at 115.) Joffe presented evidence of Petitioner's home environment and difficult upbringing. On cross-examination, she acknowledged that none of the counseling reports prepared on Petitioner revealed the presence of psychoses or serious mental problems. (*Id.* at 126.) She also concurred in the assessment of Petitioner as immature, impulsive, unremorseful, and possessed of a great potential for violence. (*Id.* at 127.) In response to the question "[y]ou felt he was a danger on the street," she responded, "[y]es." (*Id.* at 128.)

Petitioner did not call the court-appointed health expert to testify as to Petitioner's mental health or mitigating circumstances. After an evaluation, the court-appointed expert concluded that there were no mitigating circumstances in Petitioner's case.

Finally, though Petitioner did not testify in the guilt phase, Petitioner did testify in the sentencing phase. (1/29/93 Tr. 132-216.)

While the jury was deliberating on punishment during the penalty phase of the capital murder proceeding,

they submitted a question to the court stated as follows: "[I]f the defendant is given life, is there a possibility of parole at some time before his natural death," (1/29/93 Tr. at 278). The court responded: "[I]f you find the Defendant guilty, which you have in this case, you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards." (1/29/93 Tr. at 281.) The Court did not directly answer the jury's question.

Ultimately, on January 30, 1993, the jury unanimously recommended a sentence of death for Petitioner. On April 2, 1993, the court imposed judgment upon Petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder.

B. Procedural History

On September 2, 1992, Petitioner murdered Muhammad Kayani, a clerk employed at a 7-Eleven convenience store on Buelah Street in Fairfax County, Virginia. He was arrested on September 11, 1992, for an earlier robbery, together with other defendants, and ultimately connected to the 7-Eleven robbery and murder. On September 21, 1992, Petitioner was indicted by a Fairfax County grand jury on capital murder, armed robbery, and use of a firearm in the commission of a robbery.

Counsel was appointed in timely fashion, pretrial discovery was promptly pursued. On November 2, 1992, the trial court denied Petitioner's request to make an ex parte showing of need for expert assistance. (11/2/92 Tr.

20-32.) On December 8, 1992, the trial court denied Petitioner's motion for a physical exam concluding that there was a lack of information sufficient to establish the need for an exam. (12/8/92 Tr. at 6.) Counsel then proffered that he needed the exam to determine whether Petitioner suffered from a reflexive disorder. (*Id.* at 7-8.) Next, the trial court denied Petitioner's request for appointment of an expert investigator, but did appoint a third attorney to the defense team. (*Id.* at 22.) Next, the trial court declined to order the Commonwealth to turn over to Petitioner statements Petitioner claimed were exculpatory. (*Id.* at 44.)

The matter came on for trial on January 26, 1993. The first day consisted of jury voir dire and selection. At trial, Petitioner, by counsel, entered a plea of guilty to the robbery charge which was accepted by the court following the normal colloquy. However, at the request of the Commonwealth Attorney, and over the objection of defense counsel, a finding with regard to Count II of the indictment, robbery, was withheld pending the receipt of evidence of the other offenses.

At the conclusion of the evidentiary portion of the trial, the jury returned a verdict of guilty of capital murder and guilty of use of a firearm in the commission of a felony. Petitioner was sentenced to four years in the penitentiary for the latter crime. Following the jury verdict, the court found Petitioner guilty with respect to Count II, robbery, finding on the record that Petitioner's plea of guilty was freely and voluntarily given. The defense waived preparation of a presentence report, but the court, sua sponte, ordered the preparation of a presentence report on the offense of robbery. Thereafter, the jury

heard evidence with regard to punishment on the capital murder charge, and following argument and instruction by the court, returned a verdict of death.

In anticipation of the preparation of the presentence report, the matter was set over for further proceedings on March 3, 1993. Sentencing was continued from that date, however, until April 2, 1993, at which time the court imposed judgment upon Petitioner, sentencing him to death in conformity with the jury verdict for the offense of capital murder; four years in the penitentiary, in conformity with the jury verdict for use of a firearm in the commission of a felony; and life for the robbery, incident to Petitioner's plea of guilty.

Trial counsel pursued a direct appeal on behalf of Petitioner, assigning the following errors:

> 1. The Trial Court erred in denying the Appellant's Motion For A Bill of Particulars, thereby denying Appellant his rights protected by the Sixth and Fourteenth Amendments of The United States Constitution and the Constitution of Virginia.
>
> 2. The Trial Court erred, and denied the Appellant his Fifth, Sixth and Fourteenth Amendment rights, and his Rights protected by The Virginia Constitution through the denial of his motion for discovery of co-defendant polygraph questions and answers for impeachment purposes.
>
> 3. The Trial Court erred in granting an extended reasonable doubt instruction.
>
> 4. The Trial Court erred in denying the jury instruction utilized in *Commonwealth v. Wright*,

tried in the same circuit and approved by the Virginia Supreme Court.

5. The Trial Court erred in denying the defendant's proffered jury instruction regarding the inconsistent testimony of Shane Singh.

6. The Trial Court erred in admitting evidence of the Defendant's unadjudicated misconduct in violation of the United States and Virginia Constitutions.

7. The Trial Court erred in denying the Defendant's proffered sentencing jury instruction "B-S" which instructed the jury that they must all agree that the Defendant would be a future danger.

8. The Trial Court erred, and denied Defendant his rights protected by the Virginia and United States Constitutions 5th and 14th Amendment Rights, by denying Defendant's proffered sentencing jury instruction "E-S" which instructed they [sic] jury as to the standard of proof required to be convinced of the unadjudicated misconduct of the Defendant.

9. The Trial Court erred in refusing to respond to a jury question, during the sentencing stage of the trial, that Defendant would not be eligible for parole upon his conviction of capital murder in the instant matter in violation of § 19.2-264.4 of the Virginia Code and the Eighth and Fourteenth Amendments to the United States Constitution.

10. The Trial Court erred in denying Defendant the right to raise his inability to make parole upon conviction of the capital murder in the instant case.

11. The imposition of the death penalty by electrocution is cruel and unusual punishment, in violation of the Virginia Constitution and the Eighth Amendment of the United States Constitution and the Trial Court erred in finding to the contrary.

12. The Trial Court erred in withholding a finding of guilt on the underlying robbery charge, and further erred, and denied the Defendant's 5th and 14th Amendment rights by refusing to sentence the Defendant without a presentencing report despite its waiver by Defendant and his counsel and the fact that the Defendant had been incarcerated the entire period of time since the preparation of the prior presentencing report.

13. The Trial Court erred in denying the defendant funds for expert witnesses, medical doctors, and private investigators.

14. The Trial Court erred in denying the Defendant a medical expert to perform a competent physical examination to ascertain his physical disabilities.

15. The Court erred in denying the Defendant discovery regarding future dangerousness prior to trial.

16. The Trial Court erred in denying Defendant's Motion to Dismiss on the basis that the Virginia Death Penalty Statute is unconstitutional.

17. The Trial Court erred in denying defendant's motion to dismiss on the basis of the denial of due process under the United States and Virginia Constitutions.

18. The Trial Court erred in refusing to dismiss a juror who was personally acquainted with one of the Commonwealth (police) witnesses, and an additional juror who had preconceived notions regarding the brutality of the crime.

19. The Trial Court erred and violated his Fifth, Eighth and Fourteenth Amendment Rights in refusing to permit inquiry into whether the jurors held the belief that the Defendant would be executed if the jury were to impose the death sentence.

20. The Trial Court erred in denying Defendant the opportunity to voir dire the jury regarding specific mitigation circumstances about which they would be generally instructed, and further erred in denying Defendant's motion to exclude those jurors that were unable to consider specific mitigating circumstances in sentencing.

21. The Trial Court erred in denying the Defendant's motion for in-camera requests for expert witnesses in violation of his Fourth. Fifth, Sixth and Fourteenth Amendment rights of the United States Constitution and rights protected by the Virginia Constitution.

22. The Trial Court erred in denying Defendant's motion for a private investigator to aid the defense in the preparation of trial in violation of his Fifth and Fourteenth Amendment Rights and his rights protected by the Virginia Constitution.

23. The Trial Court erred in denying the Defendant's motion that it review evidence to determine whether evidence was or was not exculpatory rather than leaving such determination to the Commonwealth Attorney in violation

of his Sixth and Fourteenth Amendment Rights and rights protected by the Virginia Constitution and in violation of the discovery rules of this court.

24. The Trial Court erred in permitting hearsay testimony, regarding personal information about the victim, via the first page of the medical examiners reports without redacting hearsay portions.

25. The Trial Court erred in sustaining objections regarding the testimony about the lack of fingerprints left by Mr. Ramirez in the 7-11; as to the specific location of Mr. Ramirez on dates preceding this incident; in denying the Defendant's probing into the background of Commonwealth witness Mr. Ramirez, and in denying the defendant the opportunity to examine Mr. Ramirez and Mr. Singh regarding other offenses in which the witnesses were involved thereby denying him right of confrontation in violation of the Sixth Amendment of the Constitution and rights protected by the Virginia Constitution.

On November 5, 1993, the conviction was affirmed. *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (Va.1993). The court noted that Assignments 7, 17, 18, 19, 20, and 24 were not briefed and concluded that those issues had been waived. With regard to the remaining issues, the court addressed and ruled on the issues on the merits.

Following denial of the appeal, a petition for certiorari was filed in the United States Supreme Court. While the petition addressed multiple issues, including discovery, unadjudicated misconduct, constitutionality of the death sentence, expert assistance, and potentially

exculpatory evidence, only one assignment was significant: "Whether the Court's refusal to respond to [the] jury inquiry as to Defendant's parole status violates the Sixth, Eighth, and Fourteenth Amendments of the U.S. Constitution."

There was no action for several months, but on June 17, 1994, the United States Supreme Court decided the case of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), and ruled that where a defendant's future dangerousness is at issue and state law prohibits a defendant's release on parole, due process requires the sentencing jury to be informed that the defendant is parole ineligible.

Three days later, on June 20, 1994, certiorari in petitioner's case was granted and the case was remanded to the Virginia Supreme Court for further consideration based upon the Supreme Court's opinion in *Simmons*. *Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

As presented by Petitioner to the Supreme Court of Virginia on remand, the sole issue in Simmons was "[w]hether the due process clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." Respondent argued that Simmons was not raised in the trial court; that Petitioner was eligible for parole and Simmons, therefore, did not apply; and that Simmons was irrelevant because the sentencer can always consider parole ineligibility. On November 4, 1994, the Supreme

Court rejected Petitioner's claim, found that Petitioner was eligible for parole, and concluded that Simmons did not apply. *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (Va.1994).

Once again a petition for writ of certiorari was filed in the Supreme Court of the United States, raising many of the same issues originally presented, but the petition was rejected on April 24, 1995. *Ramdass v. Virginia*, 514 U.S. 1085, 115 S.Ct. 1800, ___ L.Ed.2d ___ (1995).

On May 11, 1995, counsel was appointed to pursue a petition for writ of habeas corpus in the courts of the Commonwealth. On August 30, 1995, Petitioner instituted a petition for writ of habeas corpus in the Virginia Supreme Court alleging the following broad categories as grounds for relief:

1. Denial of effective assistance of counsel for reasons addressing trial strategy (or lack thereof), improper voir dire, venue, jury sequestration, handling of defense experts, handling of evidence, improper preparation for examination of prosecution experts, inadequate pretrial investigation, improper handling of a co-defendant's testimony, objections addressing the murder weapon and the forensics expert, and improper handling of the sentencing phase.

2. Prosecutorial misconduct, consisting of the withholding of exculpatory evidence; use of highly prejudicial evidence (in the form of photos, the autopsy report, unadjudicated misconduct, and a co-defendant's sentence); and improper evidence regarding parole.

3. Trial court error in the form of a delayed finding of guilt on the robbery charge; failure to

strike members of the jury panel challenged for cause; failure to require the prosecution to produce certain purportedly exculpatory evidence; admission of evidence that was either highly prejudicial or not preceded by a proper foundation; instructional errors, a Simmons error; and the denial of an investigator.

4. The Virginia Supreme Court proportionality review was inadequate.

On January 19, 1996, the court denied an ex parte motion for expert assistance and an investigator. On March 18, 1996, the court denied the habeas petition without an evidentiary hearing.

On April 19, 1996, counsel filed a petition for rehearing in the state habeas proceeding, alleging as grounds for the rehearing that Petitioner was denied the effective assistance of counsel (for a variety of reasons previously presented), that the prosecution engaged in misconduct prejudicial to Petitioner, and that the trial court denied Petitioner's constitutional rights in numerous respects. Some issues were raised for the first time, and the Simmons claim was well articulated. The petition for rehearing was denied June 7, 1996.

The Circuit Court of Fairfax County set Petitioner's execution for August 28, 1996. On June 25, 1996, Petitioner filed a motion to stay execution, but the motion was denied by the Virginia Supreme Court on July 17, 1996.

On August 14, 1996, incident to plans to present a federal habeas petition, Petitioner moved for a stay of execution and for leave to proceed in forma pauperis, and for appointment of counsel in federal court.

On August 15, 1996, the execution was stayed. Thereafter, on September 11, 1996, counsel was appointed for the purpose of filing the current action.

II. CLAIMS PRESENTED

Petitioner sets forth the following claims as grounds for federal habeas relief.

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth amendments (The Simmons claim).

B. Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Eighth and Fourteenth amendments.

C. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

1. Trial counsel's trial strategy was either nonexistent or internally inconsistent.

A. Petitioner was unreasonably advised not to testify.

B. Trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position, thus establishing the requisite intent.

C. Trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner.

D. Trial counsel failed to cross examine the prosecution's "firearms identification" expert.

E. Trial counsel failed to obtain expert assistance.

2. Trial counsel failed to object to co-defendant's testimony about his life sentence.

3. Trial counsel failed to establish Petitioner's parole ineligibility.

A. Trial counsel failed to request schedule adjustments which would have created Petitioner's parole ineligibility.

B. Trial counsel failed to challenge the determination that Petitioner was eligible for parole.

4. Trial counsel failed to conduct adequate voir dire.

5. Trial counsel conceded the sole aggravating factor in the penalty phase.

6. Trial counsel failed to adequately prepare for the penalty phase.

D. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

E. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an ex parte showing of need for expert assistance.

F. The trial court's refusal to allow Petitioner exculpatory statements, the trial court's refusal to review such statements in camera and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

G. The Virginia death penalty statute on its face, and as applied, violates the Sixth, Eighth and Fourteenth amendments.

H. Petitioner was denied his right to confrontation in violation of the Sixth amendment.

I. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

J. The Virginia Supreme Court failed to perform an adequate review of Petitioner's death sentence for proportionality and for passion, prejudice or other arbitrary factors.

K. Virginia's capital murder sentencing statute is unconstitutional.

III. PROCEDURAL DEFAULT

Title 28 U.S.C. § 2254(b) requires exhaustion of claims before presentment to federal courts. A claim is exhausted if either the claim was presented to the state courts or, though never presented to the state courts, the claim if now presented to the state courts would be found to be procedurally defaulted. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

Respondent objects to the standard the Magistrate Judge employed for determining when a claim has been procedurally defaulted. In addition, in most cases, each party objected to the Magistrate Judge's underlying recommendation as to whether a particular claim was procedurally defaulted. Accordingly, the Court will first outline the rules of procedural default and its exceptions.

The Court will then determine whether each individual claim is preserved or defaulted.

Standard for Procedural Default

This Court may not review claims that have been clearly and expressly defaulted under an independent and adequate Virginia state procedural rule. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. Under Virginia law, to preserve an issue for direct appeal, a timely objection generally must be made at trial. Va. S.Ct. R. 5:25; *Coppola v. Warden of Virginia State Penitentiary*, 222 Va. 369, 282 S.E.2d 10 (Va.1981). Further, excepting ineffective assistance of counsel claims which may first be presented on collateral review, failure to raise a claim on direct appeal bars consideration of that claim in subsequent state habeas proceedings. *Walker v. Mitchell*, 224 Va. 568, 299 S.E.2d 698, 699 (Va.1983); *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (Va.1974). Finally, claims which are not presented in an original state habeas petition will not ordinarily be considered in a subsequent state petition. Va.Code § 8.01-654(B)(2).

In his motion to dismiss, Respondent argued that certain arguments supporting some of Petitioner's claims were never presented to the state courts and, therefore, the arguments were procedurally defaulted pursuant to Va.Code § 8.01-654(B)(2). The Magistrate Judge concluded: "A claim raised in a federal petition for writ of habeas corpus must be essentially the same claim as that presented in state proceedings." (R & R 26.) Additionally, in several instances, the Magistrate Judge stated that where a claim was raised in the state proceedings, though

the argument was not necessarily in the exact same nature, tenor or form, the matter was not procedurally defaulted. (*See, e.g.*, R & R 33, 36, 37.) *Citing Breard v. Pruett*, 134 F.3d 615 (4th Cir.1998) and *Mallory v. Smith*, 27 F.3d 991 (4th Cir.1994), Respondent objects and reiterates his contention that the argument presented to the federal court must be precisely the same argument presented to the state courts. Respondent claims that the Magistrate Judge considered arguments which were never presented to the state courts, but "now are presented under the heading of a claim that arguably was presented in state court."

Virginia Code § 8.01-654(B)(2) establishes a bright-line rule providing that a habeas petition "shall contain all allegations the facts of which are known to petitioner at the time of filing and such petition shall enumerate all previous applications and their disposition. No writ shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition." The Fourth Circuit has held that both the operative facts and legal principles, i.e. the argument, must be presented to the state courts or else the claim is barred from federal review. *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997). Accordingly, Respondent's objection to the standard the Magistrate Judge used to for determinations of procedural default is SUSTAINED.

Excuse of Procedural Default

Despite the rule barring federal review of claims which have been defaulted on adequate and independent

state grounds, two exceptions exist which excuse procedural default and permit federal review. First, where a petitioner can show both cause for and prejudice resulting from his default, a federal court may review a defaulted claim. *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. With respect to "cause," a petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the state's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). With respect to "prejudice," a petitioner must show that the error worked to his "actual and substantial disadvantage," not merely that it created a "possibility of prejudice." *Id.* at 494, 106 S.Ct. 2639 (emphasis in original), *quoting United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982). Second, if a petitioner cannot show "cause" and "prejudice" sufficient to excuse a procedural default, his claims may still be reviewed where refusal to do so would result in a "fundamental miscarriage of justice." *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Coleman*, 501 U.S. at 750, 111 S.Ct. 2546. To meet the miscarriage of justice exception, the petitioner must show either that a constitutional violation has probably resulted in the conviction of one who is actually innocent, *Schlup*, 115 S.Ct. at 867, or, for those petitioners who are sentenced to death, "by clear and convincing evidence that but for a constitutional error, no reasonable juror would find him eligible for the death penalty. . . . "[5] *Sawyer v. Whitley*, 505 U.S. 333, 348, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

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[5] In his motion to dismiss, Respondent argued that the "actual innocence of the death penalty" doctrine no longer provides a gateway for petitioners to have their defaulted claims reviewed on habeas. In support of this position, respondent pointed to 28 U.S.C. § 2264(a). Respondent did not pursue this argument in his objections and, for two (2) reasons, the Court offers no opinion on this argument. First, it is not clear to this Court whether Congress's intention in writing § 2264(a) was to completely eliminate the "actual innocence" exception in capital cases or merely to strictly limit what could be considered "cause" under the cause and prejudice exception. Second, because this Court has previously found that Virginia is not an "opt-in" state, (Mem. Op. and Order, Dec. 6, 1996.), § 2264(a) does not apply.

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the eighth and fourteenth amendments (The Simmons claim).

The Magistrate Judge found that this claim was not procedurally defaulted because, regardless of the precise nature or form of the argument, the issue of whether the sentencing jury was entitled to know Petitioner's parole eligibility status was presented both on direct appeal and in the state habeas proceeding. (R & R 33-34.) Respondent objects contending that the Magistrate Judge considered legal arguments which were never presented to the state courts and, therefore, may not now be considered by this Court.

At no point has Respondent directed the Court's attention to any new arguments which should have been raised in state court. In his response to the motion to dismiss, Petitioner identified two purportedly new arguments: (1) on remand from the United States Supreme

Court, the Virginia Supreme Court exceeded its constitutional authority and determined Petitioner's parole eligibility status and (2) on remand from the United States Supreme Court, the Virginia Supreme Court's decision that Petitioner was parole eligible was arbitrary. Petitioner argued that neither claim was procedurally defaulted because Petitioner could not challenge an error which did not arise until the Virginia Supreme Court handed down its opinion on the Simmons issue, and, once the decision was rendered, Petitioner was not required to submit a discretionary petition for rehearing in order to exhaust his remedies. In his reply to the Petitioner's response, Respondent summarily dismissed Petitioner's arguments as "silly," claiming that nothing prevented Petitioner from raising these arguments to the Virginia Supreme Court and, therefore, they are now barred from federal review.

The Court finds that the arguments have been procedurally defaulted. After the Virginia Supreme Court issued its decision declaring that Petitioner was parole eligible, Petitioner did not request reconsideration of the decision, rather, Petitioner presented these allegedly new arguments to the United States Supreme Court on an unsuccessful second request for review. Pursuant to *Slayton*, 215 Va. 27, 205 S.E.2d 680, Petitioner could have presented the arguments to the Virginia Supreme Court in his initial habeas petition because the issues could not have been raised at trial or on direct appeal. Petitioner, however, did not present the arguments; thus, the argument would now be procedurally defaulted pursuant to Va.Code § 8.01-654(B)(2). Accordingly, the arguments may not be considered by this Court, and Respondent's

objection is SUSTAINED. These new arguments will not be addressed on the merits, but the preserved Simmons issues will be discussed.

B. Petitioner was denied his constitutional right to the assistance of a mental health expert in violation of the Fifth, Eighth and Fourteenth amendments.

Petitioner claims that he was denied the constitutional right, pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), to the assistance of a mental health expert. The Magistrate Judge determined that the claim was procedurally defaulted because it was neither presented on direct appeal nor in the state habeas petition. (R & R 34-35.) Petitioner objects arguing that the language in the state habeas petition was a dual claim which clearly argued a violation of *Ake* in addition to ineffective assistance of counsel for failure to secure a mental health expert.

The Court finds that the Ake claim has been procedurally defaulted because it was not presented to the state courts. In his state petition, habeas counsel claimed that trial counsel was ineffective for failing to object to a court-appointed mental health expert who would not work with Petitioner and to put on expert mental health testimony. Petitioner did not, however, explicitly argue that the court-appointed mental health expert was ineffective. Accordingly, Petitioner's objection is OVERRULED. The Ake ineffective mental health expert claim will not be addressed on the merits.

C. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

1. Trial counsel's trial strategy was nonexistent or internally inconsistent.

Petitioner's claim here is two-fold. First, Petitioner claims that trial counsel's strategy was ineffective because the choice of defenses was inconsistent.[6] Second, Petitioner claims that trial counsel's strategy was ineffective because they failed in four instances to produce any evidence on Petitioner's intent. The Magistrate Judge determined that any claim of ineffective assistance of counsel based on inadequate trial strategy was not presented to the state courts and, accordingly, was procedurally defaulted. (R & R 35.) Of the four instances in which Petitioner claims intent evidence should have been produced, the Magistrate Judge evaluated them individually and determined that two were procedurally defaulted: (1) that Petitioner was unreasonably advised not to testify and (2) that, as to the location of the bullet, trial counsel was ineffective in failing to obtain experts to assist in the defense of the case.[7] (R & R 35-36.) Petitioner

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[6] That is, it was ineffective for trial counsel to argue: "The bullet did not come from Defendant's gun but if you find that it did, then Defendant did not intentionally shoot the victim but did so accidentally."

[7] The Magistrate Judge reviewed on the merits the sub-claims that (1) trial counsel failed to confront the prosecution's argument that the gun was fired twice and in an upward position, thus establishing the requisite intent, (2) trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner, (3) trial counsel failed to cross

objects arguing that the trial strategy claim is a "convenient umbrella" for the underlying sub-claims which were all presented to the state courts. Petitioner concludes, therefore, that both the trial strategy claim and the underlying sub-claims regarding intent evidence are preserved. With respect to any remaining ineffectiveness claims for failing to obtain expert assistance, which the Magistrate Judge found were not procedurally defaulted, Respondent objects.

The Court finds that the argument that the defenses were inconsistent is procedurally defaulted. In the state habeas petition, trial counsel was not charged with being ineffective for attempting to prove seemingly inconsistent defenses. Accordingly, Petitioner's objection is OVERRULED.

With respect to the claim of ineffectiveness for failure to present intent evidence, the Court finds that neither the claim itself nor the underlying sub-claims, excepting one, have been procedurally defaulted. Petitioner explicitly claimed in the state habeas petition that trial counsel was ineffective for not producing intent evidence. As to the claim of unreasonable advice not to testify, Petitioner clearly raised the issue in the state habeas petition and, additionally, in his motion to dismiss, Respondent addressed the claim on its merits. Finally, in reviewing Respondent's motion to dismiss, the Court finds that the only portion of the argument regarding expert assistance which Respondent claimed was procedurally defaulted

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examine the prosecution's firearms identification expert and (4) trial counsel failed to obtain expert assistance. (R & R 45-53.)

was that pertaining to the location of the bullet. Respondent did not argue that the remaining arguments regarding lack of expert assistance were procedurally defaulted, but instead addressed them on the merits. Consequently, the defense of procedural default was waived, *Trest v. Cain*, 522 U.S. 87, ___, 118 S.Ct. 478, 480, 139 L.Ed.2d 444 (1997), and cannot now be raised on objection to the R & R. Accordingly, Petitioner's objection is SUSTAINED and Respondent's objection is OVERRULED.

2. Trial counsel failed to object to a co-defendant's testimony about his life sentence.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 53.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

3. Trial counsel failed to establish Petitioner's parole ineligibility.

The Magistrate Judge determined that trial counsel's failure to establish parole ineligibility by failing to request rescheduling of the trial was procedurally defaulted, but that failure to challenge the determination that Petitioner was not ineligible for parole was not procedurally defaulted because it was related to the Simmons claim. (R & R 36.) Respondent objects to the

Magistrate Judge's latter determination. Petitioner concedes that neither claim was raised in the state proceedings and further, in light of the fact that the Fourth Circuit *vacated Mackall v. Murray*, 109 F.3d 957 (4th Cir.1997) in *Mackall v. Angelone*, 131 F.3d 442 (4th Cir.1997) (en banc), does not object to the Magistrate Judge's determinations. Accordingly, Respondent's objection is SUSTAINED. Neither argument will be addressed on its merits.

4. Trial counsel failed to conduct adequate voir dire.

On page 37 of the R & R, the Magistrate Judge stated that all the arguments regarding the effectiveness of trial counsel's jury voir dire were preserved. Respondent objects to this statement arguing that the Magistrate Judge should have found all claims to be procedurally defaulted, excepting those related to jurors Amelia, Powell, Ross and the questioning of the entire panel regarding mitigating factors. On page 56 of the R & R, the Magistrate Judge stated that because the claims related to jurors Amelia, Powell, Ross and the questioning of the entire pool regarding mitigating factors had been raised during the state proceedings, only those claims would be considered. With the exception of these, the Magistrate Judge declined to address any other jury voir dire issues. Accordingly, Respondent's objection is OVERRULED. Review of the merits of this claim will be limited to the issues surrounding jurors Amelia, Powell and Ross and the questioning of the entire pool regarding mitigating factors.

5. Trial counsel conceded the sole aggravating factor in the penalty phase.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 58.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

6. Trial counsel failed to adequately prepare for the penalty phase.

This claim encompasses two (2) arguments: trial counsel was ineffective for failing to object to the court-appointed mental health expert and trial counsel was ineffective for failing to present expert mitigating evidence. The Magistrate Judge determined that the former argument was procedurally defaulted, but the latter preserved. (R & R 59.) Petitioner objects raising two arguments. First, Petitioner urges that the Magistrate Judge's conclusion is inconsistent with the previous determination that the ineffectiveness claim was preserved. (R & R 34.) Second, Petitioner claims that Respondent waived procedural default.

The Court finds that the claim is not procedurally defaulted. The ineffective assistance of counsel claim was clearly raised in the state habeas proceeding where Petitioner claimed that trial counsel failed to object to the court-appointment mental health expert who would not work with the defense and failed to put on any expert

mitigating testimony. Accordingly, Petitioner's objection is SUSTAINED. Both arguments will be addressed on the merits.

D. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 62.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

E. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an ex parte showing of need for expert assistance.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 68.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected to the Magistrate Judge's conclusion. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

F. The refusal to allow Petitioner exculpatory statements, the refusal to review such statements in camera and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

Neither party objected to the Magistrate Judge's conclusion that, with the exception of the assertion of the right to an in camera hearing, this claim was procedurally defaulted. (R & R 31-33.) Accordingly, the Court adopts the findings made by the Magistrate Judge. The preserved claim will be reviewed on the merits.

G. The Virginia death penalty statute on its face and as applied violates the Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that this claim had not been procedurally defaulted. (R & R 37.) Respondent objects arguing that some of the arguments that the Magistrate Judge considered were new arguments which were never presented to the state courts. Turning to Respondent's memorandum in support of his motion to dismiss, the Court finds that Respondent argued that five (5) specific arguments for unconstitutionality were procedurally barred because they were not raised in the state proceedings. They are: (i) that jurors are not informed that a life sentence will be imposed unless the jury recommends death; (ii) that the "vileness" aggravating factor is vague; (iii) that death by legal [sic] injection is cruel and unusual; (iv) that the sentencing statute does not require that a death sentence be set aside if a court finds "good

cause;" and (v) that the sentencing statute allows for hearsay in the post-sentence report.

On direct appeal, Petitioner argued (1) that death by electrocution is cruel and unusual and (2) that the Virginia death penalty statute is unconstitutional because "future dangerousness" is not meaningfully defined and no jury instruction is required in consideration of mitigating evidence. In his state habeas petition, Petitioner did not challenge the constitutionality of the death penalty statute. Accordingly, Respondent's objection is SUSTAINED. Those particular arguments will not be considered by this Court, but any remaining arguments will be evaluated on their merits.

H. Petitioner was denied his right to confrontation in violation of the Sixth amendment.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 85.), implicitly concluding that the claim was not procedurally defaulted. Neither party objected. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

I. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

The Magistrate Judge determined that this claim was not procedurally defaulted because it had been raised both on direct appeal and in the state habeas proceedings.

(R & R 37.) Respondent objects arguing that the claim that trial counsel was inadequate for failing to object to the admission of unadjudicated conduct without a burden of proof instruction is a new claim which was not presented to the state courts.

The Court finds that the claim is not procedurally defaulted because it was clearly raised before the state courts. On direct appeal, Petitioner claimed that the trial court erred in failing to proffer to the jury an instruction which stated a burden of proof for consideration of unadjudicated misconduct. In the state habeas proceeding, Petitioner claimed that trial counsel was ineffective for failing to object to the admission of evidence of prior unadjudicated misconduct. Further, habeas counsel alleged that the trial court erred in permitting evidence of unadjudicated prior misconduct even without an objection to such evidence. Accordingly, Respondent's objection is OVERRULED.

J. The Virginia Supreme Court failed to perform an adequate review of Petitioner's death sentence for proportionality and for passion, prejudice or other arbitrary factors.

The Magistrate Judge determined that the issue of the sufficiency of the Virginia Supreme Court's proportionality review was procedurally defaulted, but that the issue of whether Petitioner's sentence was imposed under the influence of passion, prejudice or any other arbitrary factor or disproportionate was not procedurally defaulted. (R & R 33, 73.) Petitioner objects to the former conclusion. Respondent objects to the latter.

Va.Code § 17-110.1(C) mandates review of death sentences for proportionality and for passion, prejudice or arbitrariness, in addition to consideration of any errors alleged by a defendant. On direct appeal, Petitioner did not argue that either of these situations applied in his case. On direct review, the Virginia Supreme Court determined that Petitioner's death sentence was neither disproportionate nor influenced by passion, prejudice or arbitrariness. In his initial state habeas petition, Petitioner did not argue that the court had inadequately performed its review for passion, prejudice or arbitrariness, but did argue that the Virginia Supreme Court failed to adequately perform its proportionality review of his death sentence. The Virginia Supreme Court found the latter argument to be procedurally defaulted pursuant to *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680, but the court did not explain how and why *Slayton* applied to this claim. Given that the issue of whether the court adequately performed its review for proportionality could not be raised until such a review was conducted, logic dictates that the claim could not be raised until the state habeas petition was filed. Thus, the reasoning of the Virginia Supreme Court is perplexing. Nevertheless, this Court cannot review the quality of the decision.[8] It is axiomatic that federal courts do not review state decisions based solely upon adequate and independent state

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[8] Even if the Court did not find the claim procedurally defaulted, the Court finds no merit in this claim. The Fourth Circuit previously addressed the identical claim, holding that such a claim does "not provide sufficient constitutional grounds to warrant a writ of habeas corpus." *Buchanan v. Angelone*, 103 F.3d 344 (4th Cir.1996).

law. Accordingly, Petitioner's objection is OVERRULED. Because Petitioner did not argue in his federal petition that the death sentence was imposed under passion, prejudice or arbitrariness or that the sentence was disproportionate, the Court finds that the claim is not properly before the Court. Accordingly, Respondent's objection is SUSTAINED. Neither argument will be considered on its merits.

K. Virginia's capital murder sentencing statute is unconstitutional.

In his motion to dismiss, Respondent did not argue that this claim was procedurally defaulted. In the R & R, the Magistrate Judge evaluated this claim upon its merits, (R & R 77.), thereby implicitly concluding that the claim was not procedurally defaulted. Neither party objected to the Magistrate Judge's conclusion. Accordingly, the Court finds that the claim is not procedurally defaulted and will address the claim on its merits.

IV. CLAIMS REVIEWED ON THE MERITS

The Anti-terrorism and Effective Death Penalty Act ("AEDPA") is generally applicable to Petitioner's case, because his petition was filed well after April 24, 1996, the enactment date of the Act. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2068, 138 L.Ed.2d 481 (1997) (holding that the new provisions of chapter 153 generally apply to cases filed after the [AEDPA] became effective).[9]

[9] The specific provision of § 107 of the AEDPA, however, is not applicable. Although § 107 contains several provisions pertaining specifically to capital defendants, these provisions are applicable only if the state meets the "opt-in" requirements set forth in § 107. Virginia does not meet the qualifications of § 107, (Mem. Op. and Order, Dec. 6, 1996.), thus precluding its applicability to this case.

The newly amended 28 U.S.C. § 2254(d) establishes the standard of review to be applied by a federal court considering a state prisoner's petition for habeas relief. Section 2254(d) provides as follows:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Both parties object to the standard of review as outlined by the Magistrate Judge. Petitioner objects arguing that in evaluating the Virginia Supreme Court's cursory, "no merit" state habeas ruling, the proper standard of review is de novo. Respondent objects to the Magistrate Judge's determination that mixed questions of law and fact (e.g. Petitioner's ineffective assistance of counsel claims) are to be reviewed de novo. Respondent argues

that, under the AEDPA, state court findings both of fact and of law are subject to deferential review.

Section 2254(d) applies to any claim adjudicated on the merits in state court. Contrary to the argument advanced by Petitioner, a state court decision that summarily dismisses a petitioner's claim as meritless is an adjudication on the merits within the meaning of § 2254(d). *Wright v. Angelone*, 151 F.3d 151, 156, No. 97-32, 1998 WL 394990, at *4 (4th Cir. July 16, 1998); *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir.1997); *see also Parker v. Angelone*, 959 F.Supp. 319, 320 (E.D.Va.1997) (decision by state court summarily dismissing petitioner's claim as "frivolous" is an "adjudication on the merits"); *McLee v. Angelone*, 967 F.Supp. 152 (E.D.Va.1997) (holding that § 2254(d) does not require an explanatory decision from the state court).

Nevertheless, the practical significance of the § 2254(d) new standard of review is lessened in cases where the state court offers no explanation for its decision. *See Cardwell v. Netherland*, 971 F.Supp. 997, 1015 (E.D.Va.1997). In cases where there is no indication of how the state court came to its decision, it will obviously be more difficult for the federal court to determine whether the state court's ultimate determination involved an unreasonable application of federal law. As explained by the Court of Appeals for the Seventh Circuit:

> [O]f course the better the job the state court does in explaining the grounds for its rulings, the more likely those rulings are to withstand further judicial review. That is just realism. It doesn't follow that the criterion of a reasonable determination is whether it is well reasoned. It is not. It is whether the determination is at least minimally consistent with the facts and circumstances of the case.

Hennon, 109 F.3d at 335.

If there is a qualifying state decision on the merits, the writ shall not be issued unless one of the statutory exceptions is met. Section 2254(d)(1) governs the standard of review for legal claims. A federal court may grant a petition if it finds that the state decision was contrary to clearly established federal law, or involved an unreasonable application of clearly established federal law. This section abrogates the de novo review that was required under *Brown v. Allen*, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).[10] However, the review of legal claims is still de novo in the sense that federal courts must independently determine whether the state court decision is correct under federal law. The AEDPA does not require any state decision to be upheld where the decision is "contrary to" or is "an unreasonable application of" federal law. Thus, the Act does not eliminate the power of the federal judiciary to determine what the law is, as required by Article III of the United States Constitution.

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[10] Prior to passage of the AEDPA, review was de novo in the strictest sense of that term. Under the *Brown v. Allen* line of cases, insofar as petitions presented questions of law or mixed questions of law and fact, federal courts were required to treat the petitions as a wholly new complaint. Federal courts were required to treat state court adjudications in the particular case as nothing more than a potentially relevant authority from the court of last resort of another jurisdiction. *Brown*, 344 U.S. at 458, 73 S.Ct. 397.

The AEDPA did, however, alter habeas review by mandating a strict choice-of-law rule. In comparing the state decision to clearly established federal law, it is the law "as determined by the Supreme Court of the United States" that prevails. Federal courts are no longer permitted to rely on their own jurisprudence in addition to that of the Supreme Court. Thus, Petitioner must be able to point to an authoritative decision of the Supreme Court in order to secure a writ. *See Bocian v. Godinez*, 101 F.3d 465, 471 (7th Cir.1996).

In *Green v. French*, 143 F.3d 865 (4th Cir.1998), the Fourth Circuit interpreted the meaning of "contrary to" and "unreasonable application of."

> [A] decision is "contrary to" precedent only when, either through a decision of pure law or the application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result opposite to and irreconcilable with that reached in the precedent that addresses the identical issue.

Id.

> [A] decision represents an "unreasonable application of" precedent only when that decision applies a precedent in a context different from the one in which the precedent was decided and one to which extension of the legal principle of the precedent is not reasonable, when that decision fails to apply the principle of a precedent in a context where such failure is unreasonable, or when that decision recognizes the correct principle from the higher court's precedent, but unreasonably applies that principle to the facts before it (assuming the facts are insufficiently different from those that give rise to the precedent as to constitute a new context for consideration of the principle's applicability).

Id.

Section 2254(d)(2) dictates the standard of review applicable to claims based on pure questions of fact. When a petition for habeas relief is based on a challenge to a factual determination, before granting an application for a writ, the federal court must find that the state decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. 28 U.S.C. § 2254(d)(2). In addition, factual determinations made by a State court shall be presumed to be correct and the petitioner has the burden of rebutting that presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

A. The trial court's failure to allow consideration of Petitioner's parole ineligibility violated his rights under the Eighth and Fourteenth amendments (The Simmons claim).

The Magistrate Judge recommended that Petitioner's case be remanded for resentencing on the basis that, on remand from the United States Supreme Court, the Virginia Supreme Court's decision, *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360, limited the application of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133, in a manner inconsistent with the language in *Simmons*, required an inconsistent treatment of two separate convictions of Petitioner, and contradicted

more than one hundred years of Virginia law that says a conviction occurs when the jury renders the verdict. (R & R 113.) Respondent objects claiming that the Magistrate Judge clearly erred in recommending that the writ be granted on the basis of an error in state law. *See* 28 U.S.C. § 2254(d)(1). Petitioner does not object to the Magistrate Judge's recommendation, but expresses two (2) issues of concern.[11] First, Petitioner notes that, to the extent that Virginia state law was interpreted, the Magistrate Judge's decision was appropriate because the Virginia Supreme Court's decision was "so arbitrary or capricious as to constitute an independent due process or Eighth Amendment violation." *See Richmond v. Lewis*, 506 U.S. 40, 50, 113 S.Ct. 528, 121 L.Ed.2d 411 (1992). Second, Petitioner clarifies that the right to inform the jury of his parole ineligibility status stemmed from both the Eighth Amendment and the Fourteenth Amendment.

The Court finds that the judgment of the Virginia Supreme Court resulted in a decision that is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and involved an "unreasonable application" of *Simmons* as determined by the Supreme Court of the United States. Accordingly, Respondent's objection is OVERRULED. For the following reasons, the application for a writ of habeas

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[11] Petitioner also noted his concern with the Magistrate Judge's determination that the Virginia Supreme Court possessed authority and jurisdiction to calculate Petitioner's parole ineligibility because such an issue is a mixed question of law and fact. The Court, however, has determined that argument to be procedurally defaulted. *See supra* III.G.

corpus is GRANTED and Petitioner's case remanded to the Circuit Court for Fairfax County for resentencing.

1. *Simmons v. South Carolina*

Simmons represents the most recent in a series of cases incrementally refining the process of applying the death penalty by expanding, first, the sentencer's knowledge, and second, an accused's right to respond to arguments advanced by the sovereign in support of the imposition of the death penalty. The theme in all of the cases is dual. First, due process requires that a defendant be permitted to introduce, and the sentencer consider, all relevant evidence that may be viewed in a mitigating light by the sentencer. *See McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986); *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Second, a defendant must have both access to information upon which the sentencer relies in imposing the death penalty, *see Simmons; Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and the opportunity to rebut the same. *See Simmons; McCleskey; Skipper; Lockett; Gardner.* In addition to these themes, accurate information conveyed by the court, to the sentencer, is constitutionally encouraged, *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1993), without regard to how the information may be received and, in the context of the ability of a defendant, necessarily, to be able to respond.

In *Simmons*, the defendant was convicted of the murder of an elderly woman. The state relied solely on "future dangerousness" as the basis upon which the jury should consider whether the defendant should be sentenced to death or given life imprisonment as punishment for his crimes. *Simmons*, 512 U.S. at 157, 114 S.Ct. 2187. The petitioner, however, presented evidence that his future dangerousness was limited to elderly women and, therefore, the jury would have no reason to expect violent acts from him in prison. *Id.* at 158, 114 S.Ct. 2187. Further, the petitioner requested that the court instruct the jury that, in his case, "life imprisonment" did not permit parole. *Id.* "To buttress his request, [the] petitioner proffered, outside the presence of the jury, evidence conclusively establishing his parole ineligibility," *id.*, and, additionally, Petitioner presented evidence that (1) jurors believe a convicted murderer sentenced to "life imprisonment" will eventually be released from prison and (2) jurors indicate that the amount of time a convicted murderer would actually spend in prison is an important factor in choosing between life and death. *Id.* at 159, 114 S.Ct. 2187.

The trial court, however, denied the petitioner's request for an instruction regarding parole ineligibility. Further, the court denied a request for an instruction which indicated that the petitioner would remain in jail for the balance of his natural life. *Id.* at 159-60, 114 S.Ct. 2187.

During deliberations in the sentencing phase of the case, the jury asked whether life imprisonment carried with it the possibility of parole. *Id.* at 160, 114 S.Ct. 2187. The court instructed the jury not to consider parole in

reaching its verdict and further said, "the terms life imprisonment and death sentence are to be understood in their plain and ordinary meaning." *Id.* Twenty-five minutes later, the jury returned with the sentence of death. *Id.*

The issue before the United States Supreme Court was whether the jury was entitled to know that the petitioner was ineligible for parole. In a seven to two opinion, the Court concluded that the jury was so entitled. Justice Blackmun, writing for the plurality, stated:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole. The trial court's refusal to apprise the jury of information so crucial to its sentencing determination, particularly when the prosecution alluded to the defendant's future dangerousness in its argument to the jury, cannot be reconciled with our well-established precedents interpreting the Due Process Clause.

Id. at 163-64, 114 S.Ct. 2187. The opinion further stated: "[T]he jury was left to speculate about petitioner's parole eligibility when evaluating petitioner's future dangerousness, and was denied a straight answer about petitioner's parole eligibility even when it was requested." *Id.* at 165-66, 114 S.Ct. 2187.

Justice O'Connor, in an opinion concurring in the judgment and joined by Chief Justice Rehnquist and Justice Kennedy, stated:

> When the state seeks to show the defendant's future dangerousness, however, the fact that he will never be released from prison will often be the only way that a violent criminal can successfully rebut the State's case. I agree with the Court that in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention – by way of argument by defense counsel or an instruction from the court – as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id. at 177, 114 S.Ct. 2187.

2. "Unreasonable determination of the facts"

In this case, on January 29, 1993, at the time of the jury's question, Petitioner had been tried and convicted by another jury of two counts of robbery and two counts of use of a firearm in the commission of a robbery at a Pizza Hut. Pursuant to that jury's recommendation, the court had imposed a sentence of seventy-six years. (1/29/93 Tr. at 133.) Additionally, on January 29, 1993, Petitioner had been tried and convicted of two counts of

robbery and one count of the use of a firearm at a Domino's Pizza. That jury had recommended a sentence of eighteen years, but the court had not yet imposed the sentence.[12] (1/29/93 Tr. at 134.)

In its decision, the Virginia Supreme Court relied upon section 53.1-151(B1) of the Virginia Code, the statutory language establishing parole ineligibility in the event of three convictions for defined offenses. Section 53.1-151(B1) of the Virginia Code states, in part,

> Any person convicted of three separate felony offenses of (I) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (I), (ii), or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

The court found that on the day of trial, when the jury asked the question of whether there was "a possibility of parole at some time before his natural death," Petitioner had only two qualifying convictions – the Pizza Hut robbery, for which he had already been sentenced to seventy-six years, and the robbery of the 7-11 and murder of Kayani, the very offenses before the trial court for resolution. The court concluded that the Domino's Pizza

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[12] The sentence was imposed on February 18, 1993, after conclusion of the trial which is the subject matter of this appeal, but before actual imposition of the punishment by the trial court. Moreover, on February 18, 1993, Petitioner also entered a plea and was convicted of the robbery of the Bragg Towers Hotel. The record does not indicate what disposition was made for the robbery of a cab driver.

conviction did not qualify under 53.1-151(B1) because even though the jury recommended that Petitioner serve eighteen years, that sentence was, in fact, not imposed until February 18, 1993, two and one-half weeks after conclusion of the death sentence trial. *Ramdass*, 450 S.E.2d at 361.

An obvious question arises from the court's reasoning: If the Domino's Pizza conviction did not constitute a conviction for purposes of ineligibility for parole (because the court had not yet imposed a sentence), how then could Petitioner's immediate offenses for which the jury was determining the sentence (and therefore judgment had not been entered on the verdict) constitute a second predicate conviction? The Court finds no logical reason for the exclusion of the Domino's Pizza robbery conviction as a third conviction of Petitioner. From the record of the state court proceedings, the Court finds that the procedural posture of the Domino's Pizza conviction is factually indistinguishable from the procedural posture of the immediate offense. Accordingly, the Court finds that in light of the record before it, the Virginia Supreme Court made an unreasonable determination of the facts when applying the law to determine whether Petitioner was parole eligible.

3. Unreasonable Application of Simmons

In the course of deliberating on Petitioner's punishment, the jury sent the following question into the court: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" (1/29/93 Tr. at 278.) At the time of Petitioner's trial, Virginia law

precluded informing a jury, even in response to a request for information, about a defendant's parole status and whether defendant was parole eligible. *Mueller v. Commonwealth*, 244 Va. 386, 422 S.E.2d 380 (Va.1992).

The Commonwealth's immediate response to the jury's question was to advise the court of the language of the Model Jury Instruction 2.7000 which stated: "you are to decide what a just punishment is and not to concern yourself with what happens thereafter." (1/29/93 Tr. at 278.) In response thereto, Petitioner's counsel made the following statements:

> MR. PIOTROWSKI: Your Honor, obviously I don't think that that answer is sufficient for the circumstances. I'm trying to suggest the wording and I anticipated this question and I hoped to have it written out for you, I don't, I'm trying to formulate it in my mind right now.
>
> I believe that the Court [sic] should be told that they can not concern themselves with what will occur after they impose their sentence.
>
> I feel, however, Your Honor, though that the question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time.
>
> I'm looking for some kind of language that would balance out that perception. A suggestion that I have here in front of me is – I wrote as we talked, is that "You must not concern yourself with matters that will occur after you impose your sentence, but you may impose that your

sentence will be the legal sentence imposed in the case."

I'm open to any other suggestions.

(1/29/93 Tr. at 278-79.)

The court responded by quoting the Virginia Model Jury Instruction and stating to defense counsel that "that's what the law is; isn't it, Mr. Piotrowski?" (*Id.* at 279.) In response, defense counsel acknowledged that such an instruction had been given in the past, but further responded: "I think a situation like this, when you're talking about a death case, when the issue's this crucial, that something more than that is necessary because their concern is parole which they aren't allowed to be told about." (1/29/93 Tr. at 280.) The court sustained the Commonwealth's objection[13] and informed the jury that they should impose what they felt was a fair and just sentence and not concern themselves with the consequences. The jury responded by recommending that Petitioner be sentenced to death. (*Id.* at 281.)

On direct appeal, Petitioner argued that the trial court committed error in refusing to respond to the jury question in a way that would make the jury aware that he would be ineligible for parole upon his conviction of capital murder, in derogation of the Eighth and Fourteenth Amendments to the United States Constitution.

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[13] At this point, trial counsel was not obligated to offer or argue for a specific instruction contrary to controlling Virginia law, and counsel was not constitutionally defective for failing to anticipate a new rule of law. *United States v. McNamara*, 74 F.3d 514 (4th Cir.1996).

The assignment of error was rejected on direct appeal. *Ramdass*, 450 S.E.2d at 361.

In a petition seeking a writ of certiorari from the United States Supreme Court, the issue was raised in the context of the court's refusal to inform the jury of Petitioner's parole status. That petition for certiorari was granted. On remand, the sole issue before the Virginia Supreme Court was "whether the Due Process Clause of the Fourteenth Amendment was violated by the refusal of the trial judge to instruct the jury that the defendant was ineligible for parole when the prosecution relied on future dangerousness to justify imposition of the death penalty." (App. Brief at ii, Appeal to Va. S.Ct. No. 930693.)

The matter was resolved in a brief opinion issued November 4, 1994, in which the Virginia Supreme Court, in perfunctory fashion, decided that Simmons was not an issue because Petitioner was not parole ineligible on January 29, 1993. *Ramdass v. Commonwealth*, 248 Va. 518, 450 S.E.2d 360 (1994). Writing for the court, Justice Whiting stated, in pertinent part:

> At the time that the jury was considering Ramdass's penalty on January 30, 1993, Ramdass was not ineligible for parole since he had only two "separate felony offenses" within the meaning of Code § 53.1-151(B1). They were:
>
> (1) Ramdass's January 22, 1993, convictions and sentences for the armed robbery of two persons on August 25, 1992, at a Pizza Hut in Fairfax County. Since both convictions arose from the same transaction, they are considered

as one felony offense under the express provisions of Code § 53.1-151(B1).

(2) Ramdass's convictions for Kayani's capital murder and robbery arising from the same transaction and, thus, considered as one felony offense under Code § 53.1-151(B1).

We do not agree with Ramdass's contention that his January 7, 1993, conviction by a jury of an armed robbery in Alexandria also made him ineligible for parole under the statute. Judgment had not been entered on that verdict; therefore, it cannot be considered as a conviction under Code § 53.1-151(B1). *See Smith v. Commonwealth*, 134 Va. 589, 592-93, 113 S.E. 707, 709 (1922) (jury's verdict of conviction upon which no judgment had been entered not conviction within meaning of statute disqualifying person from holding public office). Since Ramdass was not ineligible for parole when the jury was considering his sentence, the Simmons decision does not affect his death sentence.

Id. at 361.

Petitioner's case is not unlike the Simmons case. In both, the prosecution relied solely upon the "future dangerousness" prong of the statutory standard to establish the necessity of imposition of the death penalty. In both, the juries explicitly asked whether the defendant would be paroled if sentenced to life imprisonment. In both, the trial court gave obtuse answers that left the juries to speculate about the meaning of life imprisonment and the probability of the accused being released from incarceration. Under these parallel circumstances, the United States Supreme Court determined that evidence of parole

ineligibility is clearly relevant to rebut future dangerousness. Nevertheless, the Virginia Supreme Court determined that Simmons did not apply to Petitioner's case because, in the court's estimation, Petitioner was not parole ineligible. The Virginia Supreme Court made this determination, despite the obviously illogical factual basis upon which it was determined that Petitioner was parole eligible and despite the United States Supreme Court's admonition that juries should not be left to speculate about parole eligibility versus life imprisonment. This, the Court finds to be an unreasonable application of *Simmons*.

Moreover, by concluding that Petitioner was parole eligible based on the lack of the ministerial act of a trial court entering judgment, the Virginia Supreme Court evaded the full import of Simmons. Even assuming the definition of "conviction" was properly determined by the Virginia Supreme Court, the trial court, prosecution, and defense must have clearly understood that Petitioner was subject to life without parole. That is, everyone was aware that, at the time of the capital sentencing phase, Petitioner had either plead guilty or been found guilty by a jury of at least three qualifying felony offenses under Virginia Code Section 53.1-151(B). Indeed, these offenses were relied upon to establish Petitioner's future dangerousness. The jury could have been informed, with all confidence, that Petitioner would never be released from prison, thereby rebutting the notion that he presented a future danger to society. Nevertheless, by the Virginia Supreme Court concluding that Petitioner was parole eligible and that therefore the trial court's answer to the jury's question was acceptable, the Commonwealth of

Virginia "succeed[ed] in securing a death sentence on the ground of future dangerousness while at the same time concealing from the jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment [for Petitioner] means without parole." *Simmons*, 512 U.S. at 162, 114 S.Ct. 2187.

4. Conclusion

For the aforementioned reasons, the Court finds that the judgment of the Virginia Supreme Court resulted in a decision that is based on an "unreasonable determination of the facts in light of the evidence presented in the State court proceeding" and involved an "unreasonable application" of Simmons as determined by the Supreme Court of the United States. Accordingly, Respondent's objection is OVERRULED, and Petitioner's case is REMANDED to the Circuit Court of Fairfax County for resentencing.

B. Petitioner was denied effective assistance of counsel in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth amendments.

Petitioner asserts numerous claims of ineffective assistance of trial counsel. To prove ineffective assistance of counsel, a litigant must prove both: "(1) deficient performance and (2) prejudice." *Lockhart v. Fretwell*, 506 U.S. 364, 369, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prove deficient performance, a litigant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed

the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. That is, a litigant must show that counsel's performance fell below an objective standard of reasonableness. *Id.* at 688, 104 S.Ct. 2052. To prove prejudice, the litigant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S.Ct. 2052. Failure to meet either prong defeats a litigant's ineffective assistance of counsel claim. *Id.* at 700, 104 S.Ct. 2052. A court need not address both components of the test if the litigant makes an insufficient showing on one part of the test. *Id.* at 697, 104 S.Ct. 2052.

1. Trial counsel's trial strategy was nonexistent or internally inconsistent.

This claim consists of two parts: the procedurally defaulted claim of ineffectiveness for presentation of inconsistent defenses[14] and the preserved claim of ineffectiveness for failure to produce intent evidence. Only the latter will be addressed here. Petitioner's claim that his trial counsel was ineffective for failing to produce intent evidence is comprised of four (4) underlying claims: (i) Petitioner was unreasonably advised not to testify, thereby failing to confront the prosecution's argument that the gun was fired twice and in an upward

[14] If the claim were not procedurally defaulted, the claim is nonmeritorious. *See Brown v. Dixon*, 891 F.2d 490 (4th Cir.1989).

position; (ii) trial counsel failed to challenge the credentials and testimony of the prosecution's medical examiner; (iii) trial counsel failed to cross examine the prosecution's firearms identification expert; and (iv) trial counsel failed to obtain an expert who would help them present their theory of the case. Characterizing these claims as "Monday-morning quarterbacking," the Magistrate Judge concluded that each of the claims was without merit.

With respect to the first and second sub-issues, Petitioner objects arguing that the Magistrate Judge failed to consider the affidavits of trial counsel wherein it was stated that these trial strategy choices were unreasonable and highly prejudicial. Even assuming Petitioner was prejudiced by not testifying, it is not deficient performance to advise one's client not to testify. *Hutchins v. Garrison*, 724 F.2d 1425, 1436 (4th Cir.1983). Therefore, the first prong is not satisfied because the performance did not fall below the objective standard of reasonableness.

With respect to the third sub-issue, Petitioner objects arguing that the firearms identification expert was never qualified as a "ballistics expert," yet he testified about ballistics matters, and, further, that trial counsel admits in his affidavit that he failed to interview the expert and erroneously allowed him to testify outside his qualifications, thereby substantially proving the prosecution's case. Upon review, the Court finds that the Magistrate Judge's reasoning on these issues is proper. (R & R 45-53.) Neither the Court's nor trial counsel's hindsight is a basis upon which to find that an unsuccessful trial tactic constitutes deficient performance. *Bell v. Evatt*, 72 F.3d 421, 429 (4th Cir.1995).

With respect to the last sub-issue, Petitioner had two objections. First, he argued that it is improper to deny expert assistance yet rely on the absence of expert evidence to defeat a claim. And second, he contended that despite the Magistrate Judge's statement that testimony was undisputed on the issue of whether the gun was twice fired, Petitioner's own testimony in the penalty phase rebutted such evidence. The Court has already determined that the decision not to have Petitioner testify in the guilt phase regarding his intent was not deficient performance. The fact that Petitioner testified in the sentencing phase does not vitiate the undisputed nature of the evidence offered in the guilt phase that the trigger was pulled two times. Accordingly, Petitioner's objection is OVERRULED. This claim lacks merit.

2. Trial counsel failed to object to co-defendant's testimony about his life sentence.

Citing Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (Va.1979), the Magistrate Judge determined that it was not ineffective assistance to permit co-defendant Singh to testify regarding his life sentence. (R & R 53-54.) Coppola held that a defendant is not entitled to offer evidence that an equally culpable co-defendant had received sentence of life instead of a death sentence. *Id.* Petitioner objects arguing that the Magistrate Judge's reliance on Coppola is erroneous because Singh was not the triggerman and, therefore, could not have been sentenced to the death penalty. Petitioner is correct that Singh was not eligible for the death penalty. Va.Code

§ 18.2-18. Nevertheless, whether such testimony prejudiced the jury is highly speculative. Without a modicum of proof, Petitioner claims that without the testimony there is a "reasonable probability that the jury would not have felt obligated to impose a harsher sentence" on Petitioner. Accordingly, Petitioner's objection is OVERRULED.

3. Trial counsel failed to conduct adequate voir dire.

With respect to Ross, Powell and Amelia, the Magistrate Judge concluded that trial counsel were not ineffective because (1) they challenged Ross and Powell but the trial judge overruled the challenges, (2) Powell was struck with a peremptory challenge, (3) Ross was the alternate and excused prior to deliberations and (4) Amelia was not selected to serve. (R & R 56.) Petitioner objects claiming that these jurors were legally unqualified to serve and, thus he was entitled either to have them stricken by the trial judge or to receive additional peremptory strikes. The Court finds that the trial judge was within his discretion to deny the challenges, *Maynard v. Dixon*, 943 F.2d 407 (4th Cir.1991), and that even if trial counsel had requested additional peremptory strikes (which they did not), there is no evidence that a biased jury was impaneled, *Ross v. Oklahoma*, 487 U.S. 81, 108 S.Ct. 2273, 101 L.Ed.2d 80 (1988). Accordingly, Petitioner's objection is OVERRULED.

With respect to Petitioner's claim that trial counsel failed to adequately voir dire all the jurors on whether they would consider mitigating factors, the Magistrate

Judge mentioned only that the Virginia Supreme Court had denied the claim on the merits. (R & R 56.) Petitioner objects claiming that the fact that some of the jurors indicated that they would not consider age or education to be mitigating factors raises a strong inference that other jurors also would not and, therefore, Petitioner is entitled to an evidentiary hearing in order to present such evidence. The Court finds that the claim is non-meritorious. The transcript reveals that many, if not all, of the jurors were asked if they could consider age and/or education as mitigating factors and, additionally, if they could follow the trial court's instructions regarding mitigating factors. (Tr. 1/26/93 111-13, 118-19, 134, 139, 142-43, 170-71, 185, 188, 193, 221-22, 238.) All indicated that they could follow the court's instructions, even if contrary to their personal opinions. For those few not asked the above questions, counsel made an unchallengeable tactical choice not to inquire. Accordingly, Petitioner's objection is OVERRULED.

4. Trial counsel conceded the sole aggravating factor in the penalty phase.

During sentencing, trial counsel stated in his opening that Petitioner was a bad man and might commit crimes in the future. Petitioner argues that these statements effectively conceded future dangerousness; therefore, trial counsel was ineffective. The Magistrate Judge determined that, pursuant to *Clozza v. Murray*, 913 F.2d 1092, 1098 (4th Cir.1990), the statements did not constitute ineffective assistance of counsel because they were consistent with maintaining credibility with the jury. Petitioner

objects arguing that *Clozza* holds that concessions are acceptable only in some cases and that this is not such a case because trial counsel conceded the very element the prosecution was required to prove beyond a reasonable doubt. The Court finds that trial counsel's statements do not constitute deficient performance. Trial counsel's theory was that no one could know whether Petitioner might commit crimes if he was on the street, but that Petitioner did not represent a future danger to society because he would spend the rest of his natural life in jail for the string of crimes for which he had been convicted. The allegedly improper statements are consistent with that theory and do not constitute deficient performance. Accordingly, Petitioner's objection is OVERRULED.

5. Trial counsel failed to adequately prepare for the penalty phase.

The Magistrate Judge determined that this claim consisted of two arguments: claims regarding the trial court's appointment of a mental health expert and other miscellaneous claims. For the reasons stated by the Magistrate Judge, (R & R 59-62.), the Court rejects the miscellaneous arguments regarding inadequate preparation. Trial counsel presented evidence of Petitioner's dysfunctional childhood through testimony by Petitioner, Petitioner's brother and mother and a probation officer who had worked with Petitioner. Although reasonable counsel may have chosen to present such evidence in a different manner, trial counsel's choice does not constitute deficient performance.

With respect to the mental health expert, Petitioner objects to the Magistrate Judge's conclusion, arguing that trial counsel was ineffective for not researching the appointed mental-health expert's background, thereby learning of his allegedly pro-prosecution bias, and for not objecting to the trial court's selection. Even assuming that counsel was deficient in not objecting to the court-appointed expert, the Court finds that Petitioner was not prejudiced. Under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), an indigent defendant is entitled to the appointment of a mental health expert when his legal sanity is likely to be a significant issue at trial. Va.Code. § 19.2-264.3:1 provides in pertinent part:

> Upon (i) motion of the attorney for a defendant charged with or convicted of capital murder and (ii) a finding by the court that the defendant is financially unable to pay for expert assistance, the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

The court-appointed expert neither found that Petitioner's sanity was at issue nor determined that Petitioner's history or character was a mitigating factor. Evidence regarding Petitioner's history and character, however, was presented through Petitioner, his mother and brother, and a probation officer. Further, Petitioner's repeated involvement in the criminal justice system had resulted in several mental evaluations which were consistent with each other. Evidence of these evaluations was presented through the probation officer. Finally, at no time has a mental evaluation of Petitioner revealed evidence that Petitioner was (or is) operating under a mental disease or defect which would render him unaccountable for his behavior. Accordingly, the Court finds that Petitioner was not prejudiced by any failure to object to the court-appointed expert or obtain an independent mental health evaluation. Accordingly, Petitioner's objection is OVERRULED.

C. Petitioner was unreasonably and unfairly deprived of basic expert assistance in violation of the Fifth, Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that the trial court was within its discretion in denying the requests for a medical doctor and expert investigator. (R & R 63.) Petitioner objects to the finding as to the medical expert. Petitioner argues that the trial court's denial of a medical expert on the grounds that "no medical evidence had been presented was an exercise in pretzel logic." The

Court finds that the trial judge's decision was not unreasonable in light of the lack of evidence Petitioner presented to justify his need for medical evaluation. Accordingly, Petitioner's objection is OVERRULED.

D. Petitioner was arbitrarily and unreasonably denied his rights under the Fifth, Sixth, Eighth and Fourteenth amendments to make an ex parte showing of need for expert assistance.

The Magistrate Judge determined that this claim was without merit because there was no constitutional entitlement to ex parte hearings on requests for the appointment of experts, and, if there is, such right would constitute a new rule that was not in place at the time of Petitioner's trial. (R & R 68.) Petitioner objects arguing that the requirement of an ex parte proceeding is firmly established by both the Supreme Court and the lower courts.

Under federal criminal procedure, when a defendant requests expert assistance, there is clearly a statutory right to an ex parte hearing. 18 U.S.C. § 3006A(e)(1). The appropriateness of conducting ex parte hearings is obvious: a defendant should not be forced to disclose its evidence and strategy to the prosecution. In *Ake*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53, the United States Supreme Court recognized the need for an ex parte hearing, but did not hold that such a hearing is constitutionally required. Consequently, the adoption of such a rule at this point in Petitioner's case would be a new rule which, generally, should not be created on collateral review. *Saffle v. Parks*, 494 U.S. 484, 488, 110 S.Ct. 1257,

108 L.Ed.2d 415 (1990). Accordingly, the objection is OVERRULED.

E. The trial court's refusal to allow Petitioner exculpatory statements, the trial court's refusal to review such statements in camera and the prosecutor's improper refusal to provide exculpatory statements denied Petitioner his Fifth, Sixth and Fourteenth amendment rights.

Neither party objected to the Magistrate Judge's determination of this claim. Accordingly, the Court adopts the Magistrate Judge's rationale, (R & R 70-73.), which is reiterated herein in pertinent part. For the following reasons, the Court finds this claim to be non-meritorious.

Petitioner's claim has three components. The first is the denial of polygraph results which trial counsel sought to use for impeachment purposes. The second component consists of statements made to the police by Petitioner's co-defendants and other prospective witnesses, including inculpatory and inconsistent statements made by co-defendants. The third is the trial court's refusal to conduct an in camera review. With respect to the first claim, polygraph material is inadmissible under Virginia law, *Robinson v. Commonwealth*, 231 Va. 142, 341 S.E.2d 159, 167 (1986). Moreover, failure to disclose polygraph results does not deprive a defendant of "material" evidence under the Brady rule when the polygraphs results are inadmissible, even for impeachment purposes, as in the Commonwealth of Virginia. *Wood v. Bartholomew*, 516 U.S. 1, 116 S.Ct. 7, 133 L.Ed.2d 1 (1995).

With respect to the second claim, in order for a Brady violation to occur, the material sought must be "material." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Evidence is "material" under Brady "only where there exists a 'reasonable probability' " that had the evidence been disclosed the result at trial would have been different. *Wood*, 516 U.S. at 5, 116 S.Ct. 7. A "reasonable probability" that the result would have been different is shown when the actions of the government "undermine[ ] confidence in the outcome of the trial." *Kyles v. Whitley*, 514 U.S. 419, 434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995), *quoting United States v. Bagley*, 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Here, counsel has not demonstrated that the withheld material undermines the confidence in the outcome of this trial.[15]

With respect to the third claim, the trial court did not commit error by refusing to examine the prosecution's file in camera to determine the presence of exculpatory material. In *Rowe v. Grizzard*, 591 F.Supp. 389 (E.D.Va.1984), similar to this case, defense counsel asked for "statements made by co-defendants and witnesses which either contradicted others' statements and/or were internally inconsistent." *Id.* at 398. The trial court refused, noting the prosecution's burden to comply with Brady. *Id.*

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[15] Moreover, *Brady* requires only that the government disclose evidence not available to the defense from other sources either directly or through diligent investigation. *Barnes v. Thompson*, 58 F.3d 971, 975 n. 4 (4th Cir.1995); *Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir.1994); *United States v. Wilson*, 901 F.2d 378, 380 (4th Cir.1990). Petitioner has not asserted that he had no other means of obtaining the material which was withheld.

In denying the federal habeas petition, the district court stated: "Absent a more specific request than was made, the trial court is not required to make an in camera inspection of the prosecution's entire file." *Id.*

F. The Virginia death penalty statutes on their face, and as applied, violate the Sixth, Eighth and Fourteenth amendments.

The Magistrate Judge determined that this claim is nonmeritorious. (R & R 77-85.) Petitioner generally objects without pointing to specific errors in the Magistrate Judge's reasoning. The Court finds that the claim is nonmeritorious. The Fourth Circuit has denied claims similar to Plaintiff's preserved claims regarding jury consideration of mitigation evidence and consideration of unadjudicated misconduct. *See Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995); *Tuggle v. Thompson*, 57 F.3d 1356, 1362 (4th Cir.1995). Accordingly, Petitioner's objection is OVERRULED.

G. Petitioner was denied his right to confrontation in violation of the sixth amendment.

Petitioner claims that he was denied the right of confrontation in the course of cross-examining co-defendant Ramirez because the trial court sustained prosecution objections to defense questions concerning Ramirez' character and the location of fingerprints at the crime scene. The Magistrate Judge determined that the claim was nonmeritorious because only issues of state criminal procedure and evidence were challenged and such issues did not rise to a constitutional level. (R & R 85-86.)

Petitioner objects arguing that the wholesale sustaining of objections prevented adequate cross examination on Ramirez' character and propensity for criminal conduct, thereby affecting the jury's verdict(s) with respect to guilt and/or sentencing.

No litigant, including a death penalty defendant, has the unlimited right to conduct an examination of any witness called to the stand. The judgment of the trial court in denying certain questions it found to be prejudicial or irrelevant was clearly within the province of the trial court and was upheld on appeal by the Virginia Supreme Court. As the United States Supreme Court noted in *Estelle v. McGuire*, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991), a federal court's habeas review is not intended to address issues of state criminal procedure and evidence. Accordingly, Petitioner's objection is OVERRULED.

H. The trial court violated Petitioner's constitutional rights by admitting unadjudicated misconduct in the penalty phase.

The Magistrate Judge determined that Virginia law permits the use of unadjudicated criminal conduct in the sentencing phase. (R & R 86.) *Citing Nichols v. United States*, 511 U.S. 738, 114 S.Ct. 1921, 128 L.Ed.2d 745 (1994), Petitioner objects arguing that the federal constitution requires that the prosecution prove by a preponderance of the evidence that the defendant committed the unadjudicated conduct. In *Nichols*, the Supreme Court held that the federal due process clause requires in a non-capital, federal action that previous conduct being used

to enhance a sentence be proved by a preponderance of the evidence. *Id.* 114 S.Ct. at 1928.

The Court finds that Petitioner's argument, if accepted, would create a new rule which was not in effect at the time his conviction became final. *Saffle*, 494 U.S. at 488, 110 S.Ct. 1257. The United States Supreme Court has repeatedly refused to determine the issue of whether unadjudicated criminal conduct can be introduced in the sentencing phase of a capital trial.[16] At the time of Petitioner's trial, Virginia statutory law permitted the introduction of such evidence when certain notice requirements are met. *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422, 435 (Va.1985); *see also Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995). Virginia law, however, did not require that the prosecution prove the conduct by any standard. *See Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342 (Va.1987). Because federal courts generally do not create new rules or apply new constitutional rights on collateral review, *Saffle*, 494 U.S. at 488, 110 S.Ct. 1257, Petitioner's claim must fail. Accordingly, Petitioner's objection is OVERRULED.

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[16] In *United States v. Beckford*, 964 F.Supp. 993 (E.D.Va.1997), the court considered the issue of whether unadjudicated criminal conduct is admissible in a federal capital case. It indicated that the states are divided over the issue. As of 1993, six (6) states permit the use of such evidence almost without limitation; ten states require certain procedural safeguards; and eight states absolutely prohibit the introduction of such evidence. *See* Steven Paul Smith, Note, Unreliable and Prejudicial: the Use of Extraneous Unadjudicated Offenses in the Penalty Phase of Capital Trials, 93 Colum.L.Rev. 1249, 1250 (1993).

I. Virginia's capital murder sentencing statute is unconstitutional.

The Magistrate Judge determined that this claim is nonmeritorious. (R & R 77-85.) Petitioner generally objects without pointing to specific errors in the Magistrate Judge's reasoning. The Court finds that the claim is nonmeritorious as the statute is not unconstitutionally vague. The Fourth Circuit has denied Plaintiff's preserved claims that the "future dangerousness" prong of the Virginia capital sentencing statute is unconstitutional on that ground. *See Gray v. Thompson*, 58 F.3d 59, 63 (4th Cir.1995) (finding that "future dangerousness" may be determined using unadjudicated misconduct); *Tuggle v. Thompson*, 57 F.3d 1356, 1362 (4th Cir.1995) (stating that Virginia is a "non-weighing" state, *i.e.* its statutory scheme narrows the class of persons eligible for death penalty and a weighing instruction is not required by the federal Constitution); *Spencer v. Murray*, 5 F.3d 758 (4th Cir.1993) (finding that "future dangerousness" prong is not vague). Accordingly, Petitioner's objection is OVERRULED.

V. REQUEST FOR EVIDENTIARY HEARING

Whether an evidentiary hearing is required is determined in light of the petition, the answer, the transcript and record of state court proceedings, and any expanded record evidence. *See* Rule 8, Rules Governing § 2254 Cases. If a hearing is not required, "the judge shall make such disposition of the petition as justice shall require." The Court finds that the facts presented in the record, transcripts of the state court proceedings, the affidavits of

trial counsel and experts, and the arguments presented in the pleadings lead to the conclusion that an evidentiary hearing is not required to address the claims raised by Petitioner. Accordingly, the request for an evidentiary hearing is denied.

VI. CONCLUSION

The Court, having examined the objections to the Magistrate Judge's R & R, and having reviewed the record and conducted a de novo review of those portions objected to, does hereby order that the petition be GRANTED and that Respondent's motion to dismiss be DENIED. Petitioner's case is REMANDED to the Circuit Court of Fairfax County for re-sentencing in light of the Court's rulings herein.

It is so ORDERED.

Bobby Lee RAMDASS, Petitioner-Appellee,

v.

Ronald J. ANGELONE, Director, Virginia Department of Corrections, Respondent-Appellant.

Bobby Lee Ramdass, Petitioner-Appellant,

v.

Ronald J. Angelone, Director, Virginia Department of Corrections, Respondent-Appellee.

Nos. 98-30, 98-32.

United States Court of Appeals, Fourth Circuit.

Argued May 4, 1999.

Decided Aug. 3, 1999.

ARGUED: Katherine P. Baldwin, Assistant Attorney General, Office of the Attorney General, Richmond, Virginia, for Appellant. F. Nash Bilisoly, IV, Vandeventer Black, L.L.P., Norfolk, Virginia, for Appellee. ON BRIEF: Mark J. Earley, Attorney General of Virginia, Office of the Attorney General, Richmond, Virginia, for Appellant. John M. Ryan, Vandeventer Black, L.L.P., Norfolk, Virginia; Michele J. Brace, Virginia Capital Representation Resource Center, Richmond, Virginia, for Appellee.

Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges.

Affirmed in part and reversed in part by published opinion. Judge Niemeyer wrote the opinion, in which Judge Widener joined. Judge Murnaghan wrote an opinion concurring in part and dissenting in part.

OPINION

NIEMEYER, Circuit Judge:

A Fairfax County, Virginia court convicted Bobby Lee Ramdass of capital murder and sentenced him to death for the murder of Mohammed Kayani during the robbery of the convenience store where Kayani was a clerk. On Ramdass' petition for a writ of habeas corpus, filed under 28 U.S.C. § 2254, the district court granted the writ and ordered the state court to resentence Ramdass, concluding that the state court had denied Ramdass due process by denying him the opportunity established by *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), to tell the jury during sentencing that he was ineligible for parole. The district court rejected the other grounds advanced by Ramdass in his petition.

Accepting the Virginia Supreme Court's state law determination that Ramdass was not, at the time of his sentencing proceedings, legally ineligible for parole, we conclude that *Simmons* was not applicable. Accordingly, we reverse the district court's order insofar as it concluded that *Simmons* required the writ to issue. Finding no error in the district court's disposition of the other issues, we affirm the remaining portion of the district court's order.

I

The facts of Kayani's murder are related by the Virginia Supreme Court as follows:

> During the night of September 1 and early morning of September 2, 1992, Ramdass and

> Darrell Wilson, both armed with pistols, were returning home in a car with three other men, Shane Singh, Edward O'Connor, and Candelerio Ramirez, after abandoning a plan to rob persons at a Roy Rogers restaurant in Fairfax County. On the way, Ramdass suggested that they rob persons at a 7-Eleven store on Buelah Street in Fairfax County.
>
> Accordingly, near one o'clock on the morning of September 2, the five men entered the 7-Eleven store. Ramdass entered first and "drew" his pistol on Kayani, a 7-Eleven clerk who was behind the cash register. Wilson, who also displayed his pistol, ordered all the customers to lie on the floor and not look at him. The other three men, who were unarmed, took the customers' wallets, money from the cash register, and cigarettes and lottery tickets from the store's stock.
>
> After Ramdass ordered Kayani to open the safe, Kayani knelt down next to the safe and unsuccessfully tried to open it. Ramdass squatted next to Kayani and yelled at him to open the safe "or I'll blow your f head off." Wilson fired his pistol at one of the customers on the floor. Immediately thereafter, Singh, standing behind Ramdass, saw Ramdass shoot Kayani in the head on his second attempt to get the weapon to fire.
>
> Just after Ramdass shot Kayani, Ramirez returned from a back room in the store. Ramirez saw Ramdass laughing as he stood over Kayani's body. Later, Ramirez heard Ramdass say that he shot Kayani because he "took too long." Shortly thereafter, Ramirez opened the front door, and Wilson, Singh, and O'Connor ran out. As Ramirez held the door open, he

urged Ramdass to "[c]ome on." However, Ramdass was "clicking the gun at the people on the floor" and told Ramirez to "[s]hut up or I'll put one in you." One of the customers also heard the clicking of the gun as Ramdass left.

When they got in the car, Ramirez heard Ramdass ask Wilson, "Why didn't you get rid of the people on the floor?"

After the men divided the robbery proceeds at Singh's home, Ramdass told Ramirez, "Don't tell anybody about this [or] I'll kill you and I'll kill your whole family."

Singh, a co-owner of the gun with Ramdass, testified that the gun would not fire unless held at a certain angle because the "bullets" in the chamber were not the right size for the gun. Julian Jay Mason, Jr., a forensic scientist specializing in firearms identification, later examined and test fired the gun. Mason testified that the 9 millimeter cartridges Ramdass used in the gun were smaller than the 38 caliber cartridges specified for the gun. Therefore, when the gun's muzzle was pointed down, the 9 millimeter cartridges slid too far forward to be struck by the firing pin. Mason further testified that when the muzzle was pointed up, the cartridge slid back closer to the firing pin, and the gun could be fired.

Ramdass v. Commonwealth ("Ramdass I"), 246 Va. 413, 437 S.E.2d 566, 568-69 (1993) (footnote omitted). Following indictment and a trial, a Fairfax County jury found Ramdass guilty of capital murder in the commission of armed robbery as well as illegal use of a firearm. Ramdass had earlier pled guilty to one count of robbery.

At the sentencing phase of trial, the Commonwealth of Virginia sought the death penalty, arguing that Ramdass presented "a continuing serious threat to society" – the "future dangerousness" predicate for imposition of the death penalty. *See* Va.Code Ann. § 19.2-264.2. In support of this argument, the Commonwealth presented evidence of Ramdass' history of theft-related crimes beginning at age 14 and his pattern of recidivism during periods of escape or probation. More specifically, the prosecution detailed how, within three months of his release on mandatory parole after serving four years of a seven-year sentence for robbery, Ramdass committed a series of at least six armed robberies. The first two robberies occurred on August 25, 1992, when Ramdass robbed a Pizza Hut in Fairfax County, abducting a woman and hitting a man. Four days later, he robbed a clerk at an apartment-hotel in Alexandria and struck him in the head with a gun. On August 30, 1992, he shot and robbed a cab driver. Later that evening, he robbed a clerk at a Domino's Pizza in Arlington. Finally, Ramdass killed Mohammed Kayani on September 2, 1992, during the sixth robbery in this eight day spree. *See Ramdass I*, 437 S.E.2d at 574. Ramdass' counsel responded to the prosecution's argument by asserting that "Ramdass will never be out of jail. Your sentence today will insure that if he lives to be a hundred and twenty two, he will spend the rest of his life in prison."

During sentencing deliberations, the jury asked: "if the Defendant is given life, is there a possibility of parole at some time before his natural death?" While recognizing that Virginia law did not permit a sentencing jury to

be informed of the defendant's parole eligibility, Ramdass' counsel nevertheless maintained that "the [jurors'] question itself implies that they have a perception that if they give a life sentence that he will be out in a very short period of time" and that it was necessary to inform the jury otherwise with "some kind of language that would balance out that perception." Over defense counsel's objection, the trial judge told the jurors that they "should impose such punishment as [they] feel is just under the evidence and within the instructions of the Court" and that they "are not to concern [them]selves with what may happen afterwards." The jury returned a verdict recommending death on the capital murder count, based upon Ramdass' "future dangerousness," and recommending four years imprisonment on the firearm count.

At the sentencing hearing in April 1993, Ramdass' counsel urged the court to impose a sentence of life in prison instead of death in light of Ramdass' ineligibility for parole under Virginia's three-strikes provision.[1] *See*

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[1] Ramdass' parole eligibility at the time of the sentencing hearing was governed by Virginia's three-strikes statute, which provides that an individual is ineligible for parole if he has been "convicted of three separate felony offenses" of murder, rape, or armed robbery, which "were not part of a common act, transaction or scheme." Va.Code Ann. § 53.1-151(B1). At the time the jury was deliberating his sentence in this case, Ramdass had already been sentenced (the week before) to 76 years imprisonment in connection with the Pizza Hut armed robbery. In addition, about three weeks earlier, on January 7, 1993, a jury had returned a verdict finding Ramdass guilty in the Domino's Pizza armed robbery, for which it recommended an 18-year sentence. The court, however, had not yet entered judgment in that case. It did so nearly three weeks after the jury in this case concluded its sentencing deliberations.

Va.Code Ann. § 53.1-151(B1). Defense counsel proffered to the court that three jurors had told him that they would have imposed a life sentence rather than death if they had known that Ramdass would not be eligible for parole. Rejecting defense counsel's request, the court sentenced Ramdass to death.

On direct appeal to the Virginia Supreme Court, Ramdass argued, inter alia, that his death sentence violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because the trial judge prevented him from telling the jury that he was parole ineligible, a potentially mitigating factor. Rejecting that argument, the Virginia Supreme Court stated that Ramdass had advanced "no persuasive reason" to modify prior Virginia precedent holding that "a jury should not hear evidence of parole eligibility or ineligibility because it is not a relevant consideration in fixing the appropriate sentence." *Ramdass I*, 437 S.E.2d at 573 (citing *Wright v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379, 392 (1993)).

From that court's decision, Ramdass filed a petition for writ of certiorari with the United States Supreme Court. While that petition was pending, the United States Supreme Court decided *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), holding that when a prosecutor argues future dangerousness to a capital sentencing jury, a defendant who is parole ineligible has a due process right to respond to that argument by informing the jury, through argument or instruction, of his ineligibility for parole. After deciding *Simmons*, the Supreme Court granted Ramdass' petition for certiorari and remanded his case to the Virginia Supreme Court for

reconsideration in light of *Simmons*. *See Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994).

On remand, Ramdass asserted that because he was ineligible for parole under Virginia's three-strikes statute, *Simmons* applied to his case and required that he be allowed to "meet the state's case against him" by informing the jury of his parole ineligibility. The Virginia Supreme Court, however, reaffirmed Ramdass' death sentence, concluding that the holding of *Simmons* was not implicated. Noting that *Simmons* applies "only if Ramdass was ineligible for parole when the jury was considering his sentence," the Virginia Supreme Court determined that Ramdass was "not ineligible for parole since he had only two separate felony offenses within the meaning of [the three-strikes provision]." *Ramdass v. Commonwealth ("Ramdass II")*, 248 Va. 518, 450 S.E.2d 360, 361 (1994) (internal quotation marks omitted). While recognizing the Pizza Hut conviction and the Kayani murder conviction as predicate offenses under the three-strikes statute, the court rejected Ramdass' argument that the January 7, 1993 jury verdict of guilty in the Domino's Pizza robbery was also a predicate conviction because "[j]udgment had not been entered on that verdict." *Id.* Accordingly, the court stated, "it cannot be considered as a conviction" under the three-strikes provision. *Id.* (citing *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707, 709 (1922)).

Pursuing state post-conviction relief, Ramdass again asserted in his state habeas petition that *Simmons* required that the jury be accurately informed as to his parole eligibility status, although he did not specifically challenge the Virginia Supreme Court's determination in *Ramdass II* that under Virginia law he was not ineligible

for parole. Ramdass also claimed that his trial counsel were constitutionally ineffective for, inter alia, failing to investigate and to object to the appointment of Dr. Stanton Samenow as his mental health expert because Dr. Samenow was "notoriously pro-prosecution" and refused to work with the defense. In arguing the ineffective assistance of counsel, Ramdass stated also that he was denied the reasonable assistance of a mental health expert at trial, in violation of both *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985) (holding that in limited circumstances, a criminal defendant has a Fourteenth Amendment right to access to a competent psychiatrist) and Virginia Code § 19.2-264.3:1 (entitling indigent capital defendants to the assistance of a mental health expert). The Virginia Supreme Court dismissed the petition. It ruled that Ramdass' *Simmons* claim was barred from review under the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970) (holding that an issue previously decided against the petitioner on direct appeal may not again be considered on post-conviction review), and it summarily rejected Ramdass' ineffective assistance of counsel claim.

Seeking habeas relief in the federal courts, Ramdass filed this petition in February 1997, alleging, among other things, unconstitutional error in the trial court's failure to allow the jury to consider his alleged parole ineligibility. He also claimed that trial counsel were constitutionally ineffective for failing to investigate the views and reputation of Dr. Samenow, for failing to object to his appointment, and for failing to seek alternative mental health testimony. Finally, he alleged that his Fourteenth Amendment right to the assistance of a mental health expert had

been violated, either under *Ake* or by deprivation of a state-created right to such assistance provided in Va.Code Ann. § 19.2-264.3:1. The district court granted Ramdass a writ of habeas corpus based on the *Simmons* claim, dismissed the remaining claims, and ordered the state trial court to resentence him. *See Ramdass v. Angelone*, 28 F.Supp.2d 343, 356-74 (E.D.Va.1998). From the district court's order, the Commonwealth of Virginia appealed to challenge the *Simmons* ruling, and Ramdass cross-appealed to preserve his claim on various other grounds rejected by the district court.

II

In its appeal, the Commonwealth of Virginia raises two issues: (1) that the *Simmons* claim was defaulted because it was not properly raised in state court, and (2) that Ramdass is, in any case, not entitled to relief under *Simmons* because, had he been sentenced to life imprisonment, he would not have been parole ineligible under Virginia law.

The Commonwealth's first point – that Ramdass failed to preserve his *Simmons* claim by raising it in state court as required by 28 U.S.C. § 2254(b) (barring federal courts from entertaining habeas petitions from individuals who have not exhausted their state court remedies) – does not merit an extended discussion. Prior to filing his federal habeas petition, Ramdass raised his core *Simmons* claim – that due process entitled him to inform the jury that he was ineligible for parole – to the Virginia Supreme Court on at least three separate occasions: in his first direct appeal, in his direct appeal on remand from the

United States Supreme Court, and in his state habeas petition. Indeed, the most compelling evidence that Ramdass did not default his *Simmons* claim is the fact that the Virginia Supreme Court disposed of that claim by declaring it barred from review on state habeas by the rule of *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), which proscribes the relitigation of claims that have already been adjudicated on the merits in state court on direct appeal.

While it is true, as the Commonwealth points out, that Ramdass did not specifically contest the parole eligibility determination in his state habeas petition, he did assert the broader, more basic claim, which he had made all along, that the trial court's refusal to give the jury that information on his request violated his constitutional right to due process. We believe that the Commonwealth's characterization of Ramdass' *Simmons* claim for this purpose is unduly narrow. Accordingly, we conclude that the district court did not err in finding that the Simmons claim was not defaulted. We now turn to the merits.[2]

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[2] The Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), establishing the applicable standard of review, provides in relevant part:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly

A

Understanding first the precise rule in *Simmons* will aid our analysis of Ramdass' claims. In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the prosecutor had argued to the jury during the penalty phase of trial that the death sentence was appropriate because Simmons, who had assaulted and killed several elderly women, was a future danger to society. To rebut this argument, Simmons contended that because he was only a threat to elderly women, none of whom he would ever encounter in prison, he did not pose such a danger. He proffered evidence that he was legally ineligible for parole and requested an instruction to the jury that if sentenced to life imprisonment, he would remain imprisoned "for the balance of his natural life." *Id.* at 160, 114 S.Ct. 2187. The trial court denied Simmons' request to inform the jury, either by argument or instruction, of his ineligibility for parole under South Carolina law. The United States Supreme Court ruled that this denied Simmons due process as guaranteed by the Fourteenth Amendment. *Id.* at 156, 171, 114 S.Ct. 2187 (Blackmun, J., plurality opinion); *id.* at 178, 114 S.Ct. 2187 (O'Connor, J., concurring). We recognize Justice O'Connor's concurrence as the controlling opinion in *Simmons* because it represents the narrowest grounds upon which a majority

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established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

of the Court agreed. *See Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Townes v. Murray*, 68 F.3d 840, 849 (4th Cir.1995); *see also O'Dell v. Netherland*, 521 U.S. 151, 158, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997).

Writing for the plurality, Justice Blackmun held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." *Simmons*, 512 U.S. at 156, 114 S.Ct. 2187. When the jury lacks such information, the plurality noted, there is a real danger that the state will "succeed[ ] in securing a death sentence on the ground, at least in part, of . . . future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Id.* at 162, 114 S.Ct. 2187.

In her concurrence, Justice O'Connor recognized that when a state prosecutor argues future dangerousness to the jury, the defendant's only opportunity to rebut that argument will often be by telling the jury that "he will never be released from prison." *Id.* at 177, 114 S.Ct. 2187. Justice O'Connor went on to conclude that

> in such a case the defendant should be allowed to bring his parole ineligibility to the jury's attention – by way of argument by defense counsel or an instruction from the court – as a means of responding to the State's showing of future dangerousness. And despite our general deference to state decisions regarding what the jury should be told about sentencing, I agree

> that due process requires that the defendant be allowed to do so in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future.

Id.

Accordingly, the grounds on which both the plurality and Justice O'Connor agree are summarized in *Townes v. Murray*, 68 F.3d 840, 850 (4th Cir.1995):

> *Simmons* does not hold, as the plurality opinion at one point put it, that "due process requires that the sentencing jury be informed that the defendant is parole ineligible," *id.* at [156, 114 S.Ct. 2187] (plurality opinion). It only holds more narrowly that "[w]here the State puts the defendant's future dangerousness in issue, and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury – by either argument or instruction – that he is parole ineligible." *Id.* at [177, 114 S.Ct. 2187] (O'Connor, J.). . . . Put in terms familiar from philosophical and jurisprudential debates over the proper meaning of "equality" and "equal protection," the defendant's right, under *Simmons*, is one of opportunity, not of result.

In short, a defendant in a capital case is constitutionally entitled, under *Simmons*, to inform the sentencing jury of parole ineligibility by argument or, on his request, by instruction from the court when (1) the prosecution makes the "future dangerousness" argument that the defendant will pose a threat to society in the future and

(2) the only available alternative sentence to death is life imprisonment without the possibility of parole.

It is undisputed in this case that Ramdass meets the first requirement. The prosecutor at Ramdass' sentencing proceeding argued that the death penalty was necessary solely because Ramdass was a future danger to society. Whether Ramdass meets the second requirement is the principal source of dispute in the appeal before us.[3] Resolution of this issue depends on how *Simmons* defines parole ineligibility and whether, under the standards for making that determination, Ramdass was ineligible for parole at the time of the penalty phase of trial.

B

In *Ramdass II*, the Virginia Supreme Court held that *Simmons* did not apply to Ramdass' case because *Simmons* required legal ineligibility for parole and Ramdass was not ineligible for parole under Virginia law. The Court concluded that if sentenced to life imprisonment on the

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[3] It is undisputed that the Supreme Court decided *Simmons* before Ramdass' direct appeal was final. *See Ramdass v. Virginia*, 512 U.S. 1217, 114 S.Ct. 2701, 129 L.Ed.2d 830 (1994) (granting Ramdass' petition for certiorari on direct appeal and remanding to the Virginia Supreme Court for reconsideration in light of *Simmons*); *cf. O'Dell v. Netherland*, 521 U.S. 151, 117 S.Ct. 1969, 138 L.Ed.2d 351 (1997) (declaring that *Simmons* announced a "new rule" under *Teague* for all already final convictions). Accordingly, the anti-retroactivity component of § 2254(d) would not bar application of *Simmons* to Ramdass' habeas petition on retroactivity grounds if *Simmons* is otherwise applicable as a matter of substantive law.

Kayani murder, Ramdass would not have been "convicted of three separate felony offenses" of murder, rape, or armed robbery as required for parole ineligibility under Virginia's three-strikes statute. Va.Code Ann. § 53.1-151(B1). According to the court, Ramdass' qualifying convictions at the time were (1) the Pizza Hut armed robbery conviction, upon which judgment had been entered, and (2) the Kayani murder conviction. The court acknowledged that a jury had also returned a verdict finding Ramdass guilty of armed robbery in the Domino's Pizza incident. But, relying on *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922), which held that conviction does not occur until judgment is entered, the court concluded that the Domino's Pizza robbery could not be counted as the third strike under the Virginia statute because the court had not entered judgment on that guilty verdict at the time that the jury in this case was deliberating Ramdass' sentence. *See Ramdass II*, 450 S.E.2d at 361.

Ramdass contends that the Virginia Supreme Court misconstrued *Simmons* as requiring a state law determination of parole ineligibility rather than "the functional and common-sense [im]possibility of parole" as the trigger for the right to inform the jury of parole ineligibility. Moreover, even if state law governs the parole ineligibility determination for purposes of applying *Simmons*, Ramdass, in substance, accuses the Virginia Supreme Court of attempting to avoid the application of Simmons by adopting a novel and highly technical definition of "convicted" in the three-strikes provision. Further, Ramdass maintains that even if a conviction requires the entry of judgment, as *Ramdass II* held, the Domino's Pizza guilty

verdict should count as a conviction because the entry of judgment was nondiscretionary, purely ministerial, and legally insignificant. In short, Ramdass argues for a pragmatic, functional, nonlegalistic concept of when a defendant is ineligible for parole.

Because Ramdass advances an erroneous interpretation of *Simmons*, we must begin by turning to *Simmons* itself. *Simmons* grants capital defendants a due process right in state trials to advise a jury of parole ineligibility only when the only alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole. That condition cannot be a general question of practicality determined by a federal habeas court, as Ramdass argues. Parole eligibility is a state law question. Under *Simmons*, only those capital defendants who are parole ineligible under state law at sentencing are constitutionally entitled to inform the jury that they will be ineligible for parole if sentenced to life imprisonment. In other words, a trial court must determine the question of whether *Simmons* applies to a particular defendant based on whether state law renders that defendant ineligible for parole. *See Simmons*, 512 U.S. at 156, 114 S.Ct. 2187 (Blackmun, J., plurality opinion) (limiting the holding to situations where "state law prohibits the defendant's release on parole"); *id.* at 176, 114 S.Ct. 2187 (O'Connor, J., concurring) (citing South Carolina statutes to demonstrate that for Simmons "the only available alternative sentence to death . . . was life imprisonment without the possibility of parole").

When Ramdass argues that *Simmons'* applicability is not conditioned on "a state's determination of 'parole ineligibility' at the moment of capital sentencing" but

rather on a nonlegalistic "common-sense [im]possibility of parole," he advances a new interpretation of *Simmons* that is simply incompatible with the logic of *Simmons* itself. In relying on Justice O'Connor's statement that *Simmons* applies in "cases in which the only available alternative sentence to death . . . is life imprisonment without possibility of parole," *id.* at 177, 114 S.Ct. 2187, to argue that a federal, functional standard applies to parole ineligibility determinations, Ramdass ignores the *Simmons* plurality's repeated reference to state law as the determining factor for whether or not a defendant is ineligible for parole. *See, e.g., id.* at 156, 114 S.Ct. 2187 ("We hold that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible" (emphasis added)); *id.* at 165, 114 S.Ct. 2187 (observing that the defendant's ability to use parole ineligibility to rebut a future dangerousness argument depends "on the fact that he was legally ineligible for parole" (emphasis added)); *id.* at 165 n. 5, 114 S.Ct. 2187 ("The Due Process Clause will not tolerate placing a capital defendant in a straitjacket by barring him from rebutting the prosecution's arguments of future dangerousness with the fact that he is ineligible for parole under state law" (emphasis added)). Moreover, his reliance on Justice O'Connor's language is also misplaced. Ramdass' interpretation not only reads too much into Justice O'Connor's phraseology, but it also takes the phrase out of context. Nothing in Justice O'Connor's concurrence indicates that she disagreed with the plurality and believed that the parole eligibility determination was

governed by anything other than state law. On the contrary, she cited state law to show that Simmons himself was ineligible for parole, *see id.* at 176, 114 S.Ct. 2187, and she concluded that Simmons was entitled to communicate his parole ineligibility to the jury because "the only alternative sentence to death under state law was life imprisonment without possibility of parole," *id.* at 178, 114 S.Ct. 2187 (emphasis added). *See also id.* at 176, 114 S.Ct. 2187 ("In a State in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact").

In addition, Ramdass' argument for equating legal parole ineligibility with a common-sense impossibility of parole is at odds with case law from this circuit. Under Ramdass' theory, defendants who are, as a practical matter, unlikely to be paroled – perhaps because a state only rarely grants parole or because the defendant would be over a hundred years old when finally legally eligible – would be entitled to a *Simmons* instruction. Yet, we have consistently refused to apply *Simmons* to cases in which the defendants were not legally ineligible for parole at the time of sentencing. *See, e.g., Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.1999) (refusing to extend *Simmons* to apply to a defendant who would not become eligible for parole for twenty-five years, under state law); *Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998) (holding that "[s]ince Keel would have been eligible for parole had he not been sentenced to death, [citing state law], he is not entitled to any relief under our current interpretation of *Simmons*"), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Fitzgerald v. Greene*, 150 F.3d 357, 367 (4th Cir.) (declining to apply *Simmons* after Virginia

Supreme Court determined defendant was not ineligible for parole under the three strikes statute because his convictions arose out of the same transaction), *cert. denied*, ___ U.S. ___, 119 S.Ct. 389, 142 L.Ed.2d 321 (1998).

Finally, as a matter of simple logic, the fact that a defendant will have no possibility of parole if given a life sentence can only stem from the legal conclusion that state law bars eligibility for parole. Because parole eligibility is entirely a creature of state law, Ramdass' conception of practical or functional parole eligibility must inevitably collapse into a determination of state law.

Even were we persuaded by Ramdass' theory that practical rather than legal parole ineligibility suffices to trigger *Simmons*, we would conclude that it was not "clearly established" as required by 28 U.S.C. § 2254(d)(1). *Cf. Keel*, 162 F.3d at 269. This statutory provision, which requires that the state court decision at issue be inconsistent with "clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), "imports an anti-retroactivity principle into federal habeas law." *Green v. French*, 143 F.3d 865, 873 (4th Cir.1998). It resembles, but does not simply codify, the anti-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). In fact, we have observed that the standard of § 2254(d)(1) is "even more stringent" than *Teague*. *Weeks v. Angelone*, 176 F.3d 249, 266 n. 9 (4th Cir.1999); *see also Gosier v. Welborn*, 175 F.3d 504, 510 (7th Cir.1999) (noting

that § 2254(d)(1) "closes the escape hatches in *Teague*").[4] Thus, either under Teague or under § 2254(d)(1), Ramdass' argument for an extension of *Simmons* would fail.

C

Having determined that *Simmons* applies only to a capital defendant who, under state law, is legally ineligible for parole at the time of sentencing, we turn to the question of whether Ramdass meets this threshold requirement. The Virginia Supreme Court held that, under the three-strikes statute, he did not. *See Ramdass II*, 450 S.E.2d at 361. The district court held that the state court's conclusion was an unreasonable determination of fact. *See Ramdass v. Angelone*, 28 F.Supp.2d at 365.

As an initial matter, we clarify that the parole eligibility determination is a question of law, not fact, as the Virginia Supreme Court has recognized. *See Fitzgerald*, 150 F.3d at 367 (citing *Fitzgerald v. Commonwealth*, 249 Va. 299, 455 S.E.2d 506, 510 (1995)). Accordingly, to the extent that the district court's decision to grant the writ rested on the unreasonable-determination-of-fact rationale, it cannot stand.

More significantly, parole eligibility is a question of state law and therefore is not cognizable on federal

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[4] In fact, § 2254(d)(1) can be seen as stricter in that it does not recognize *Teague*'s two traditional exceptions which permit retroactive application of new rules which either "place[ ] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or are "watershed rules of criminal procedure." *See Green*, 143 F.3d at 873 (quoting *Teague*, 489 U.S. at 311-12, 109 S.Ct. 1060).

habeas review. The AEDPA provides explicitly that a federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a) (emphasis added). Because the definition of what constitutes a conviction in Virginia's three-strikes statute and the application of that state law definition to the facts of Ramdass' case are purely questions of state law, we have no power to revisit these questions on federal habeas review.

Even if we were not so constrained, however, we would be unpersuaded by Ramdass' argument that the Virginia Supreme Court adopted an artful, form-over-substance interpretation of the three-strikes statute to thwart his *Simmons* claim. At most, Ramdass can complain about the effect of the random timing of his trials. If judgment had been entered on the Domino's Pizza robbery verdict 19 days earlier, then Ramdass would have been ineligible for parole under the three-strikes statute and accordingly entitled to inform the jury of that fact. However, given that Ramdass committed the Pizza Hut robbery, the Domino's Pizza robbery, the Kayani murder and robbery, and several other potentially qualifying offenses within several days of each other, the random order in which he was tried for these various offenses was entirely foreseeable, dictated only by the docket of the relevant county court. In fact, it is equally possible that Ramdass could have been tried on the most serious charge – the Kayani murder – first, in which case he would have had only one qualifying conviction at the

time of sentencing and, thus, would be an additional conviction short of making a valid *Simmons* claim.

Second, Ramdass characterizes the Virginia Supreme Court's reliance on *Smith v. Commonwealth*, 134 Va. 589, 113 S.E. 707 (1922) (discussing the meaning of the term "conviction" in the context of a statute removing public officials from office upon conviction of crimes of moral turpitude), as a judicial version of grasping at straws. Yet, sound reasoning supports *Smith's* holding that conviction requires an entry of judgment, rather than simply a jury verdict. *Cf.* Fed.R.Crim.P. 32(d)(1) (requiring an entry of judgment signed by the judge). Even though *Smith's* factual predicate is wholly unrelated to parole eligibility, the age-old rationale underlying its definition of conviction is designed to protect defendants. Requiring the entry of judgment – even if it appears to be only a formal step of the process – in contexts in which additional negative consequences are to be imposed based on the conviction, provides an additional layer of procedural protection against unfairness or corruption.

Third, Ramdass attempts to portray the *Smith* decision as an irrelevant relic. While the Virginia Supreme Court had not cited this case in a published opinion since the 1920s, the intermediate appellate court has observed that "Virginia courts have defined the word 'convicted' in accordance with *Smith*, but only in the context of a defendant who has been confronted with some type of forfeiture." *Fields v. Commonwealth*, 5 Va.App. 229, 361 S.E.2d 359, 362 (1987) (purporting to limit Smith to its facts). As a type of forfeiture, parole ineligibility fits neatly within the narrow circumstances in which the Smith definition of conviction is appropriate, or even necessary. Upon

amassing a given number of convictions for certain crimes, a defendant forfeits his right to be considered for parole under the standard operation of the parole system. This is precisely the kind of serious deprivation that should not occur without the solemn imprimatur of the court's entry of judgment on the decision of the jury. Finally, the fact that the Virginia Supreme Court has remanded for re-sentencing upon finding a *Simmons* violation in another case defeats the implication that the Virginia Supreme Court is somehow hostile to enforcing the *Simmons* right. *See Mickens v. Commonwealth*, 249 Va. 423, 457 S.E.2d 9 (1995).

We have included this discussion only in an effort to dispel Ramdass' insinuation that the Virginia Supreme Court acted craftily in denying his *Simmons* claim. In the end, however, we reiterate that this dispute about the meaning of the Virginia three-strikes statute is wholly a question of state law that cannot provide the basis for a federal court to grant the writ of habeas corpus. *See* 28 U.S.C. § 2254(a).

III

On his cross-appeal, Ramdass contends that the district court erred in dismissing, either as defaulted or meritless, the following four other claims in support of his habeas petition: (1) the Virginia Supreme Court's determination that he was eligible for parole as of the time of sentencing under Virginia law was so arbitrary as to violate due process; (2) the denial of access to assistance from a mental health expert violated his right to due process; (3) the ineffective assistance of counsel

denied him the constitutional right to counsel; and (4) the denial of funds for expert assistance and an evidentiary hearing violated his right to due process. We address these claims in order.

A

First, Ramdass claims that the Virginia Supreme Court's interpretation of the three-strikes provision was so inconsistent with Virginia precedent and so arbitrary that it violated due process. In response to the Commonwealth's contention that this claim was defaulted by failure to raise it in state court, he argues that it could not have been defaulted because the Virginia Supreme Court in fact addressed it simply by concluding that he was parole eligible under Virginia law. This argument, however, proves too much. Carried to its logical conclusion, Ramdass' argument would mean that every judicial ruling carries with it an implicit, due process rubber-stamp. There is no evidence that the Virginia Supreme Court's parole eligibility determination silently encompassed an additional conclusion that the parole eligibility finding itself comported with due process. Because, as Ramdass concedes, ineffective assistance of state habeas counsel will not show cause for his default, *see Mackall v. Angelone*, 131 F.3d 442, 446-49 (4th Cir.1997), we have no power to reach the merits of this independent due process claim on federal habeas. *See* 28 U.S.C. § 2254(b)(1)(A). In any event, we would reject the claim on the merits for the reasons given in our discussion in Part II(C), above.

B

Ramdass next challenges the district court's rejection of his claims that he was illegally denied the assistance of a mental health expert based on two, separate theories: (1) the due process right to access to a mental health expert under *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985), and (2) the due process right to non-arbitrary enforcement of Virginia Code § 19.2-264.3:1, which grants capital defendants the assistance of a mental health expert. Although the district court did not distinguish between these two arguments, holding that they were defaulted, we conclude (1) that the *Ake* claim was preserved but that the Virginia Supreme Court did not unreasonably apply clearly established federal law in dismissing it, and (2) that the claim based on the arbitrary enforcement of state law was defaulted.

The standard for state court exhaustion prior to filing a federal habeas petition is not, as the Commonwealth suggests, whether a petitioner presented the "identical" claim in state court but rather whether he "fairly presented" his federal claim to the state court. "A claim is fairly presented when the petitioner presented to the state courts the substance of his federal habeas corpus claim. The ground relied upon must be presented face-up and squarely; the federal question must be plainly defined." *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir.1997) (emphasis added and internal quotation marks and citations omitted).

Under this standard, Ramdass did include in his state habeas petition at least the "substance" of his federal

claim that he was denied a mental health expert in violation of due process under *Ake*. Even though the claim appeared under the heading of ineffective assistance of counsel and the sub-heading of failure to secure a mental health expert, Ramdass nonetheless grounded his claim on the seminal Supreme Court case, *Ake*. He summarized the holding of *Ake* and alleged facts in support of his claim that Dr. Samenow was pro-prosecution and refused to assist the defense by identifying any mitigating factors for the sentencing phase. Even so, the Virginia Supreme Court dismissed this claim, finding that it had no merit. In doing so, the Virginia Supreme Court did not unreasonably apply clearly established federal law. *See* 28 U.S.C. § 2254(d).

Ake provides a right to assistance of a mental health expert only if a defendant made a showing to the trial court that his mental state was at issue in his defense of the charges or if, in arguing future dangerousness in the sentencing phase, the prosecution used expert psychiatric testimony. *See Ake*, 470 U.S. at 82-83, 105 S.Ct. 1087 (noting that the need for the assistance of a psychiatrist is "readily apparent" either when "the defendant is able to make an ex parte threshold showing to the trial court that his sanity is likely to be a significant factor in his defense" or "when the State presents psychiatric evidence of the [capital] defendant's future dangerousness" during the penalty phase (emphasis added)). Neither condition was met here.

The due process claim for the arbitrary enforcement of a state statute was defaulted because, in his state habeas petition, Ramdass stated only that his rights under the state statute had been denied. This is no more

than a state law question. Ramdass did not make the further argument, necessary to make the claim cognizable on federal habeas review, that this denial constituted a violation of his right to due process under the Fourteenth Amendment. *See* 28 U.S.C. § 2254(a).

C

In support of his ineffective assistance of counsel claim, Ramdass argues that his trial counsel were deficient in failing to object to Dr. Samenow's appointment and in failing to seek assistance from an alternative mental health expert once they realized that Dr. Samenow would not be helpful. We conclude that the Virginia Supreme Court did not unreasonably apply clearly established federal law in dismissing this claim for lack of merit. *See* 28 U.S.C. § 2254(d).

To prevail on his ineffective assistance of counsel claim, Ramdass must meet two well-established requirements. First, he "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This is a difficult showing to make because in assessing the reasonableness of counsel's course of action, "[o]ur review . . . is highly deferential" to counsel. *Wilson v. Greene*, 155 F.3d 396, 403 (4th Cir.1998) (*citing Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). Second, he must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The district court, assuming arguendo that Ramdass could satisfy the deficiency

prong of Strickland, ruled that Ramdass's ineffective assistance claim failed because he could show no prejudice. *See Ramdass*, 28 F.Supp.2d at 370. We agree.

Instead of presenting testimony from Dr. Samenow, who had failed to identify any mitigating factors in his report on Ramdass, Ramdass' trial counsel presented testimony from Ramdass, his brother, his mother, and a probation officer during the penalty phase in an attempt to establish mitigating factors. Because the jury was aware of the dysfunctional circumstances of Ramdass' childhood, Ramdass cannot now show a reasonable probability that psychiatric testimony as to the same circumstances would produce a different result. Moreover, neither *Ake*, 470 U.S. at 83, 105 S.Ct. 1087, nor Virginia Code § 19.2-264.3:1(A) creates a right to a particular expert. Accordingly, Ramdass cannot show a reasonable probability, as required by Strickland, that the Virginia Supreme Court would have either removed Dr. Samenow upon objection or appointed an additional expert upon request.

D

On Ramdass' final point, we conclude that, because Ramdass failed to make out a prima facie case as to his mental health expert and ineffective assistance claims, the district court did not err in denying Ramdass funds for expert assistance or an evidentiary hearing.

IV

In sum, we reverse the district court's decision to grant Bobby Lee Ramdass' petition for a writ of habeas corpus based upon a *Simmons* violation. Because *Simmons* is limited to situations where state law renders the defendant legally, not merely practically, ineligible for parole, we conclude that the Virginia Supreme Court did not unreasonably apply clearly established federal law when it ruled that *Simmons* did not apply to Ramdass' case because Ramdass was not ineligible for parole under Virginia law. In addition, we affirm the district court's opinion as to the remaining issues raised by Ramdass on cross-appeal. The judgment of the district court is

AFFIRMED IN PART AND REVERSED IN PART.

MURNAGHAN, Circuit Judge, concurring in part and dissenting in part:

I concur in the majority's handling of most of the issues raised by Ramdass.[1] I respectfully dissent, however, from the majority's treatment of Ramdass' Simmons

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[1] I note that I concur only in the judgment on the *Ake* claim. *Ake* provides that under certain circumstances "the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. 68, 83, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Ramdass presented ample evidence to show that Dr. Stanton Samenow's professed and public views make him incompetent to aid a defendant in finding and presenting mitigating factors at a defendant's sentencing phase, and that Dr. Samenow did not conduct an appropriate examination. Dr. Samenow has publicly stated that criminals are a "different breed of person," (J.A. at 347), who seek to manipulate the system for their own ends. He has abandoned sociologic, psychologic, and mental illness explanations for criminal behavior and holds the view that "[m]ost diagnoses of mental illness [in criminals] resulted from the criminal's fabrications." (J.A. at 348.) Dr. Samenow's published works state that circumstances have nothing to do with criminal violations and that "providing the criminal with an opportunity to present excuses deferred him and us further and further from change." (J.A. at 348.) According to a report submitted to the district court by Dr. Reuben Koller, Dr. Samenow's views obviate his ability to evaluate mitigating factors relating to the history or character of a criminal defendant "because he is of the opinion that no mitigating factors can exist." (J.A. at 474.) Even if Dr. Samenow were to abandon his public beliefs and identify mitigating factors, his testimony would be subject to damaging impeachment on cross-examination from his own publicly expressed views. In fact, the record shows that just that happened at another capital sentencing trial. Further, Dr. Koller opined that Dr. Samenow's examination of Ramdass was "incomplete, deficient and inadequate according to conventional psychological standards." (*Id.*) Dr. Koller's preliminary evaluation of the records available to Dr. Samenow indicated seven specific factors ignored by Dr. Samenow which could be considered significant factors in mitigation. It is also worth noting that Dr. Samenow has been at the center of at least two other constitutional challenges. *See Swann v. Taylor*, 173 F.3d 425, 1999 WL 92435, at *6-*9 (4th Cir.1999) (unpublished table disposition) (claiming *Ake* violation); *Wright v. Angelone*, 151 F.3d 151, 161 (4th Cir.1998) (claiming ineffective assistance of counsel for using Dr. Samenow).

We have suggested that *Ake* requires only an expert and an examination, *see Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.1998), not a competent expert and an appropriate examination, *but see id.* at 409 (Michael, J., concurring) (noting that the *Wilson* majority did not squarely reject the right to an appropriate examination). I agree that *Ake* does not require "effective assistance of a psychiatric expert." *See, e.g., Pruett v.*

claim. Because it seems evident that Ramdass should be able to inform the jury, by argument or court instruction,

of his non-eligibility for parole if sentenced for life imprisonment, I would affirm the district court on the Simmons claim so that the sentencing jury could be accurately informed that Ramdass would be parole ineligible.

Thompson, 996 F.2d 1560, 1573 n. 12 (4th Cir.1993). In my view, though, the Supreme Court requires more than just a warm body with a prefix attached to his name; *Ake* provides a right to a "competent expert" and an "appropriate examination." *Ake*, 470 U.S. at 83, 105 S.Ct. 1087. (I note that competence and appropriateness, based on objective professional criteria, are entirely different than effectiveness).

Ultimately, however, Ramdass' *Ake* claim must fail. On direct appeal I would follow the Tenth Circuit and hold that *Ake* applies when the state presents any evidence on future dangerousness and the indigent defendant establishes the likelihood his mental condition is a significant mitigating factor. *See Castro v. Oklahoma*, 71 F.3d 1502, 1513 (10th Cir.1995); *Liles v. Saffle*, 945 F.2d 333, 340-41 (10th Cir.1991). *Compare Tuggle v. Netherland*, 79 F.3d 1386, 1387-88 (4th Cir.1996) (describing the *Ake* right as arising when the prosecution first presents psychiatric testimony), *with Swann*, 173 F.3d 425, 1999 WL 92435, at *2 (stating *Ake* applies "when a capital defendant's future dangerousness is to be a significant factor at the penalty phase of the trial"). Constrained by the Anti-Terrorism and Effective Death Penalty Act of 1996 amendments to 28 U.S.C.A. § 2254(d)(1) (West Supp.1999), however, I believe that *Ake's* application when the prosecution has not presented its own psychiatric evidence on future dangerousness is not clearly established by the Supreme Court. *Cf. Rogers v. Gibson*, 173 F.3d 1278, 1285 n. 5 (10th Cir.1999) (stating that it is doubtful that applying Ake when state has not presented psychiatric evidence of future dangerousness is clearly established by the Supreme Court).

I.

A clear statement of the factual context of this case is useful to gain an understanding of the arbitrariness of the result reached by the majority.

The jury found Ramdass guilty of the Kayani murder on January 28, 1993. His sentencing hearing began the next day. At that hearing, the prosecution presented as evidence of Ramdass' future dangerousness the fact that he had been found guilty of the Pizza Hut robbery, *see infra*, and the Domino's Pizza robbery, *see infra*. The Commonwealth also emphasized that previously Ramdass had committed crimes while released on "mandatory" parole. While deliberating Ramdass' sentence, the jury asked the judge, "if the Defendant is given life is there a possibility of parole at some point before his natural death?" (emphasis added). Rather than answering that question, the judge told the jury that they were "not to concern [themselves] with what may happen" after they impose his sentence. On January 30, 1993, the jury imposed a sentence of death.

On appeal, the Supreme Court ordered the Virginia Supreme Court to reconsider Ramdass' case in light of *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). *Simmons* involved facts almost identical to those at bar. In *Simmons*, a defendant was made parole ineligible by a conviction for capital murder. At the sentencing phase for that crime, the defendant requested that the jury be instructed that a life sentence would not carry with it the possibility of parole. To bolster his position, the defendant cited, inter alia, a

study indicating that more than 75 percent of those surveyed in South Carolina considered the amount of time a defendant would actually have to spend in prison to be an "extremely important" or "very important" factor in choosing between life and death. *Simmons*, 512 U.S. at 159, 114 S.Ct. 2187. As in the case at bar, during deliberations, the jury asked the judge a single question: "Does the imposition of a life sentence carry with it the possibility of parole?" *Id.* at 160, 114 S.Ct. 2187. The trial judge gave a vague answer and instructed the jury not to consider parole in reaching its verdict. *Id.* Within minutes, the jury returned a sentence of death.

On remand in the case at bar, the Virginia Supreme Court held that *Simmons* was inapplicable because under Virginia law, Ramdass was not technically parole ineligible at the time the jury was deliberating his capital sentence. Under Virginia law, a felon is parole ineligible if he has been "convicted" of three offenses of murder, rape, or robbery with a deadly weapon (a "predicate conviction"); when multiple predicate convictions are part of a common act, transaction, or scheme, they are counted as only one predicate conviction. *See* Va.Code Ann. § 53.1-151(B1) (Michie 1998) (the "three strikes law").

At the time the capital jury was considering his sentence, Ramdass had been found guilty of five robberies and one murder.[2] One of the robberies involved no deadly weapon and therefore was not a predicate conviction. Two of the other robberies were part of the same

[2] He was also awaiting trial on two other armed robberies, both involving assault with a deadly weapon.

transaction. On December 15, 1992, a jury had found Ramdass guilty of two counts of robbery and one count of using a firearm in the commission of a robbery (the "Pizza Hut robbery"). Judgment and sentence for this crime was officially imposed on January 22, 1993. At the time that Ramdass was sentenced on the Kayani murder, this conviction was still subject to a motion to set aside the verdict for trial error or insufficiency of the evidence. *See* Va. Sup.Ct. R. 3A:15(b) (Michie 1998). It was also subject to an appeal. *See* Va.Code Ann. § 17-116.05:3 (Michie 1996). The Virginia Supreme Court counted the Pizza Hut robbery as only one predicate conviction.

The final two armed robberies were also part of one transaction. On January 7, 1993, in a separate proceeding, a jury found Ramdass guilty of two counts of robbery and one count of using a firearm in the commission of a robbery (the "Domino's Pizza robbery"). Judgment and sentence on this crime was not officially imposed until February 18, 1993. The Virginia Supreme Court reasoned that the Domino's Pizza robbery did not count as a predicate conviction because at the time of the Kayani sentencing, Ramdass had not yet been "convicted" of that offense under the meaning of that term in the three strikes law – although he had been found guilty, judgment had not yet been officially entered. With only one predicate conviction besides the Kayani murder, the Virginia Supreme Court held that *Simmons* was inapplicable because on January 30, 1993 Ramdass was technically eligible for parole.

While this result is sound under the legal technicalities of Virginia law, in practical reality it was a certainty that Ramdass would be parole ineligible upon

entry of the Kayani conviction. Indeed, at the Kayani sentencing, there was no practical difference between the Domino's Pizza robbery guilty verdict and the Pizza Hut robbery guilty verdict. From January 30, 1993 until February 18, 1993, no motions were outstanding which could have affected the Domino's Pizza conviction. Ramdass claims that as of January 30, 1993, his motion to strike the evidence as insufficient as a matter of law in the Domino's Pizza robbery case, *see* Va. Sup.Ct. R. 3A:15(a), had already been denied. So, except for the ministerial act of formally entering judgment, on January 30, 1993, Ramdass was in exactly the same position vis-a-vis the Domino's Pizza robbery as he was vis-a-vis the Pizza Hut robbery: the finding of guilt was subject only to a Rule 3A:15(b) motion to set aside the verdict and an appeal under Virginia Code § 17-116.05:3.[3] Thus, although it was a virtual certainty at his capital sentencing that Ramdass would be ineligible for parole, the Virginia Supreme Court found that Simmons was not applicable because Ramdass was still in some technical legal sense eligible for parole.

[3] The Commonwealth also points out that under Va.Code Ann. §§ 19.2-298 and 303 (Michie 1995), the court could suspend the imposition of the sentence or suspend the sentence in whole or in part. This is irrelevant, however, for two reasons. First, the Pizza Hut robbery was also subject to a § 19.2-303 suspension of the sentence. Second, regardless of whether a sentence has been suspended, nothing in §§ 19.2-298 or 19.2-303 erases the conviction for purposes of parole ineligibility under Virginia's three strikes statute.

Nineteen days after the jury delivered Ramdass' sentence for the Kayani murder, the ministerial act of entering judgment on the Domino's Pizza robbery was completed, giving Ramdass his second predicate conviction. The Kayani sentence and judgment was officially imposed on April 6, 1993 – more than one month after formal entry of judgments on the Pizza Hut robbery and the Domino's Pizza robbery. When judgment for the Kayani murder was entered, that judgment, combined with the Pizza Hut conviction and the Domino's Pizza conviction gave Ramdass his third strike, making him ineligible for parole. This was exactly the occurrence of which Ramdass had requested the jury be informed.

II.

The majority takes the view that the Virginia Supreme Court's interpretation of Virginia law settles the case. I disagree. There is no doubt that the Virginia Supreme Court was entitled to interpret the word "convicted" in Virginia Code § 53.1-151(A) in the way it did. Further, we are bound by this interpretation of state law by the highest state court. This case does not hinge on the word "convicted" in Virginia law, however. The case hinges upon the requirements of the Due Process clause of the Fourteenth Amendment. In Simmons, the Supreme Court defined one aspect of this Due Process clause. Admittedly, the right recognized in Simmons is dependent to some extent upon state law: The right depends upon state parole law; the right only applies to those for whom state law has eliminated the possibility of parole. But, the right is a federal right, nonetheless, and the

scope and parameter of the *Simmons* right is a matter of federal constitutional law.

The majority rejects a "pragmatic, functional, non-legalistic concept" of the *Simmons* right. I think the majority has overlooked the genesis of *Simmons*. *Simmons* was merely an extension of the rule in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), that "elemental due process require[s] that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' " *Skipper*, 476 U.S. at 5 n. 1, 106 S.Ct. 1669 (plurality opinion) (*quoting Gardner*, 430 U.S. at 362, 97 S.Ct. 1197), quoted in part in *Simmons*, 512 U.S. at 164, 114 S.Ct. 2187 (plurality opinion), and *quoted in id.* at 175, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment). As both the plurality opinion and the O'Connor concurrence[4] recognized, the fact that the defendant will never be released from prison "will often be the only way that a violent criminal can successfully rebut the State's case [of future dangerousness]." *Simmons*, 512 U.S. at 177, 114 S.Ct. 2187 (O'Connor, J., concurring in the judgment); *id.* at 163-64, 114 S.Ct. 2187 (plurality opinion) ("In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. . . .

[4] We have recognized Justice O'Connor's concurrence as the controlling opinion in *Simmons*. *See Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), *cert. denied*, ___ U.S. ___, 119 S.Ct. 2353, 144 L.Ed.2d 249 (1999); *Townes v. Murray*, 68 F.3d 840, 849 (4th Cir.1995).

Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.").

This principle has full force in the case at bar. At capital sentencing, the prosecution presented evidence of Ramdass' future dangerousness. Some of this evidence included the fact that Ramdass had committed the Pizza Hut robbery and the Domino's Pizza robbery. More importantly, the Commonwealth repeatedly referred to the fact that Ramdass had committed many of his crimes while on parole. The Commonwealth mentioned the phrase "mandatory parole" several times, suggesting to the jury that the Commonwealth would have no choice but to parole Ramdass at some future date. In the face of this evidence of future dangerousness, Ramdass was rendered powerless to explain to the jury that, but for what was at that point a meaningless ministerial act, he was ineligible for parole under state law.[5] Thus, under *Gardner*, *Skipper*, and *Simmons*, *Ramdass* was denied his "elemental due process" right to deny or explain the

[5] The majority sets up a straw man by asserting that Ramdass has asked us to extend *Simmons* to situations in which a defendant is not ineligible for parole under state law. The majority relies in part on *Roach v. Angelone*, 176 F.3d 210, 220 (4th Cir.1999), *Keel v. French*, 162 F.3d 263, 270 (4th Cir.1998), and *Fitzgerald v. Greene*, 150 F.3d 357, 367 (4th Cir.1998), to defeat this straw man. In each of those cases, however, the defendant remained eligible for parole under state law even when all ministerial acts were completed. Of course *Simmons* did not apply to each of those defendants. Those cases are wholly inapposite here, where Ramdass' whole argument is based on his parole ineligibility under state law.

Commonwealth's evidence of future dangerousness. *See Simmons*, 512 U.S. at 175 (O'Connor, J., concurring).

It is also important to remember the audience of the *Simmons* right. *Simmons* is concerned about the defendant's ability to present rebuttal evidence to a jury. Thus, *Simmons* is grounded in the right to present information which might affect a jury's decision making. Juries are not concerned about legal technicalities or remote and theoretical possibilities. They are concerned about practical realities. The Supreme Court recognized this point in *Simmons*. In *Simmons*, South Carolina argued that informing the jury that the defendant would be parole ineligible was inherently misleading because future contingencies such as legislative reform, commutation, and clemency might allow the release of the prisoner. The plurality rejected this argument, holding that the defendant could not be denied the right to rebut prosecution evidence of future dangerousness merely because of "hypothetical future developments." *Simmons*, 512 U.S. at 166, 114 S.Ct. 2187. The court reasoned that a parole ineligibility instruction was more accurate than no instruction at all, which would inevitably leave the jury to assume that the defendant would eventually be released. *Id.* Nothing in Justice O'Connor's concurrence indicates that she disagreed with the plurality that remote contingencies were irrelevant to the due process analysis.

In the case at bar, the majority hides its reliance on hypothetical future developments behind a state law shield. Because Ramdass did not become technically "parole ineligible" under Virginia law until judgment was formally entered on the Domino's Pizza robbery, the majority holds that Simmons is inapplicable. But at the

time of the Kayani sentencing, only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible. The reason the Supreme Court rejected reliance on such future hypothetical developments is evident in the arbitrary result of the case at bar. At the time of the Kayani sentencing, the court had already rejected Ramdass' motions in the Domino's Pizza robbery case to set aside the jury's verdict before entry of judgment. *See* Virginia Sup.Ct. R. 3A:15(a). Formal entry of the conviction at that point was merely a ministerial act. Thus, for all realistic intents and purposes, it was a guarantee that Ramdass would be parole ineligible when the Kayani conviction was formally entered.

Further, there was at the time of the Kayani sentencing no practical basis for distinguishing between the Pizza Hut robbery guilty verdict and the Domino's Pizza robbery guilty verdict. Because the Rule 3A:15(a) motions had been denied for the Domino's Pizza robbery verdict, both verdicts were subject to an identical degree of uncertainty – either could be set aside only under a Rule 3A:15(b) motion or on appeal. Yet the majority asserts that the constitution requires us to treat the one as a certainty and the other as if it did not exist.

Splitting hairs when a man's life is at stake is not becoming to a judiciary or a legal system. I do not believe that due process requires or allows such arbitrary results. I would hold that, regardless of the technical, legalistic definition of "conviction" used by the Virginia Supreme Court, Radars [sic] had a constitutional due process right

to inform the jury of the wholly accurate information that by the time the sentence they were deliberating was officially entered by the judge, he would be ineligible under state law for parole. I respectfully dissent.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NOs. 98-30 (L) & 98-32

BOBBY LEE RAMDASS

Petitioner-Appellee,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent-Appellant.

PETITION FOR PANEL REHEARING
and PETITION FOR REHEARING EN BANC

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* * *

STATEMENT OF PURPOSE

Pursuant to Fed. R. App. P. 40 and 35, Petitioner-Appellee Bobby Lee Ramdass, by counsel, petitions for

rehearing and for rehearing *en banc* of the panel *majority's* decision to reverse the district court and to deny Mr. Ramdass habeas corpus relief. In the judgment of counsel, the following situations exist: (1) the majority panel decision conflicts with the decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and the conflict is not addressed in the majority opinion; (2) the proceeding involves questions of exceptional importance involving the Constitutional right of a capital defendant to rebut evidence of future dangerousness; and (3) the majority panel decision overlooked a material fact and legal matter, i.e., that Ramdass was *in fact* ineligible for parole on the date of his sentencing.

INTRODUCTION

At the time of Ramdass' trial, Virginia law provided that a prisoner was ineligible for parole if he had three unrelated convictions ("three strikes") for armed robbery, rape, or murder. Code of Virginia § 53.1-151(B1).

Ramdass' first "strike" was the armed robbery of a Pizza Hut in Fairfax. The jury found him guilty and fixed his sentence at 76 years in prison on December 15, 1992. The trial court entered judgment on January 22, 1993.

Ramdass' second "strike" was the armed robbery of a Domino's Pizza in Arlington. The jury found him guilty and fixed his sentence at 18 years in prison on January 7, 1993. Ramdass moved to strike the evidence as insufficient immediately after the jury rendered its verdict, and the court denied that motion. Entry of judgment was scheduled by the Arlington clerk for February 18, 1993.

Ramdass' third "strike" was the capital murder of Mohammed Kayani. The jury found Ramdass guilty on January 29, 1993, and proceeded to the penalty phase, the prosecution arguing for the death penalty on the basis of Ramdass' future dangerousness. During sentencing deliberations, the jury asked the court: "[I]f the Defendant is given life, is there a *possibility of parole* at some time before his natural death?" (JA 154) (emphasis added). The court's only answer was to tell the jury to "impose such punishment as you feel is just. . . . *you are not to concern yourselves with what may happen afterwards.*" (JA 154-57) (emphasis added). The jury returned with a verdict of death.[1]

Judgment was, in fact, entered on the Domino's Pizza robbery on the scheduled February 18, 1993 date.

After Ramdass' conviction and sentence were upheld on direct review, the United States Supreme Court remanded for reconsideration in light of its recent decision in *Simmons*. The Virginia Supreme Court concluded that *Simmons* did not apply because Ramdass was technically eligible for parole at the time of his sentencing trial. The Court refused to count the Domino's Pizza robbery as the second "strike" because on January 30 – the day the jury inquired about the possibility of parole – "[j]udgment had not been entered on [the robbery] verdict;

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[1] The court entered judgment and imposed this sentence on April 6, 1993. Under Virginia law, Ramdass could not have been released on parole between January 29, 1993 and April 6, 1993. *See* Code of Virginia § 53.1-151(A).

therefore, it cannot be considered as a conviction." *Ramdass v. Commonwealth*, 450 S.E.2d 360, 361 (Va. 1994), *cert. denied*, 514 U.S. 1085 (1995).[2]

Ramdass has consistently argued that he had a due process right to tell the jurors that if they sentenced him to life imprisonment for capital murder, there was no possibility he would be released prior to his natural death. The panel majority disagreed. It held that because Ramdass was technically eligible for parole on the date of the jury's inquiry and for 19 days thereafter, *Simmons* did not apply. "[O]nly those capital defendants who are parole ineligible *under state law* at sentencing are constitutionally entitled to inform the jury that they will be ineligible for parole if sentenced to life imprisonment." (Slip Op. at 13, underling added).

The panel minority and district court both viewed the refusal to inform the jury of the practical effect of the various convictions as arbitrary and violative of Ramdass' elemental due process right to deny or explain the Commonwealth's evidence of future dangerousness. Characterizing the entry of judgment on the Domino's Pizza robbery as a "ministerial act" which "guarantee[d] that Ramdass would be parole ineligible when the Kayani conviction was formally entered," the panel minority concluded that Ramdass "had a constitutional due process right to inform the jury of the wholly accurate information that by the time the sentence they were deliberating

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[2] For purposes of this petition for rehearing only, Ramdass does not contest the correctness of that decision.

was officially entered by the judge, he would be ineligible under state law for parole." (Op. at 30).

ARGUMENT

I. THE MAJORITY PANEL DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT'S DECISION IN *SIMMONS v. SOUTH CAROLINA* AND INVOLVES A QUESTION OF EXCEPTIONAL IMPORTANCE.

It is respectfully submitted that the majority both failed to address a specific conflict with the Supreme Court's decision in *Simmons*, in which event at least panel reconsideration would be proper, and misinterpreted the core holding in *Simmons*, making rehearing *en banc* appropriate. To date, two federal judges (the district court and the minority in dissent) have opined that Ramdass' constitutional due process rights were violated, while two other federal judges have reached a contrary conclusion. The issue could not be closer. The situation presented here, of a defendant for whom there was no reasonable possibility of parole or release at the time of sentencing, is so close to the rule announced in *Simmons* that to distinguish it would result in unpredictable decisions based on the actions of docketing clerks and thus elevate forum shopping to Constitutional proportions.

The majority's reading of *Simmons* is so hyper-technical that the Supreme Court's decision loses its meaning and arbitrary results, such as here, are inevitable. Effectively, the majority held that a defendant, whom everyone concedes would never have been released from prison if sentenced to life, cannot tell his sentencing jury

of that fact because a ministerial act of entering judgment had not yet taken place. Nowhere in the majority's opinion is issue taken with the proposition that, when the jury *asked* whether there was any "possibility of parole" if a life sentenced was imposed, the accurate and truthful answer would have been "No." As the minority opinion clarifies, the ministerial act of imposing judgment on the Domino's Pizza conviction was so inevitable that (borrowing language directly from *Simmons*) "only some hypothetical future development as remote as legislative reform, commutation, or clemency, could have affected entry of the Domino's Pizza robbery conviction and therefore prevented Ramdass from being parole ineligible." (Slip. Op. 29).

However, according to the majority, only when a defendant has legally been declared ineligible for parole *at the time of the sentencing itself*, can a defendant tell a jury that there is no possibility of parole, even if there is, in fact and law, no possibility of parole. This reading of *Simmons* reduces the constitutional due process right declared there to a minor legal footnote entirely dependent on the vagaries of individual state laws and clerk docketing procedures.

The error in the majority's reading of *Simmons* is dramatized by the following sentence in the opinion:

> If judgment had been entered on the Domino's Pizza robbery verdict 19 days earlier, the Ramdass would have been ineligible for parole under the three-strikes statute and accordingly entitled to inform the jury of that fact.

(Slip Op. 16).

That judgment, which the majority, the minority, the Commonwealth and everyone who has reviewed this case agree was inevitable and certain, unfortunately took place 19 days *later*. Essentially, Ramdass will be executed

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UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
September 17, 1999

No. 98-30
CA-96-831-2

BOBBY LEE RAMDASS

Petitioner – Appellee

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections

Respondent – Appellant

No. 98-32
CA-96-831-2

BOBBY LEE RAMDASS

Petitioner – Appellant

v.

RONALD J. ANGELONE, Director,
Virginia Department of Corrections

Respondent – Appellee

On Petition for Rehearing and Rehearing En Banc

Appellee/cross-appellant filed a petition for rehearing and rehearing en banc and appellant/cross-appellee filed a response in opposition to the petition.

Judge Murnaghan voted to grant panel rehearing. Judges Widener and Niemeyer voted to deny.

A member of the Court requested a poll on the petition for rehearing en banc. The poll failed to produce a majority of the judges in active service in favor of rehearing en banc. Judges Murnaghan, Ervin, Michael and Motz voted to rehear the case en banc, and Chief Judge Wilkinson, and Judges Widener, Wilkins, Niemeyer, Hamilton, Luttig, Williams, Traxler and King voted against rehearing en banc.

The Court denies the petition for rehearing and rehearing en banc.

Entered at the direction of Judge Niemeyer for the Court.

For the Court,

/s/ Patricia S. Connor
CLERK

SUPREME COURT OF THE UNITED STATES

No. 99-7000

Bobby Lee Ramdass,

v.

Ronald Angelone, Director, Virginia Department of Corrections

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Fourth circuit

ON CONSIDERATION of the Motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

January 7, 2000